Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
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No. 82-1845

In The

Supreme Court of the United States

October Term, 1983

THE STATE OF COLORADO,

Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,

Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 22, 1983.
CERTIORARI GRANTED OCTOBER 3, 1983.

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RELEVANT DOCKET ENTRIES

1. Affidavit for Search Warrant
   Search Warrant
   Return and Inventory
   Signed: November 7, 1981
   Executed: November 7, 1981

2. Information
   Filed in District Court: November 12, 1981

3. Motion for Disclosure of Deals and Compensation
   Filed in District Court: February 25, 1982

4. Motion for Disclosure of Informant
   Filed in District Court: February 25, 1982

5. Motion to Supress
   Filed in District Court: February 25, 1982

6. Motion to Dismiss, Or In The Alternative, to Suppress
   Filed in District Court: September 28, 1982

7. Hearing on Motion to Supress
   Held in District Court: September 9, 1982

8. Continued Hearing on Motion to Supress
   Held in District Court: September 24, 1982

9. Continued Hearing on Motion to Suppress
   Held in District Court: October 4, 1982

10. Findings of Fact, Conclusions of Law and Order
    Entered by District Court: October 7, 1982

11. Order
    Entered by District Court: October 12, 1982

12. Notice of Interlocutory Appeal
    Filed in District Court: October 18, 1982

13. Opening Brief
    Filed in Colorado Supreme Court on November 29, 1982

14. Answer Brief
    Filed in Colorado Supreme Court on December 16, 1982

15. Reply Brief
    Filed in Colorado Supreme Court on December 29, 1982

16. Opinion of Colorado Supreme Court
    Issued on February 22, 1983

COUNTY COURT

In the County Court, City and County of Denver, State of Colorado

AFFIDAVIT FOR SEARCH WARRANT
BEFORE THE UNDERSIGNED COUNTY JUDGE

The undersigned, an officer authorized by law to execute warrants within the City and County of Denver, State of Colorado, being duly sworn deposes and says: That he (has reason to believe) that (on the premises) (in the vehicle) known as 8690 Norwich Street & Vehicles: 1975 Ford pick-up (Lic. #TM 7478), 1978 Dodge Mobile Home (Lic. TZ 819) in the County of Adams, State of Colorado, there is now located certain property, to-wit: Controlled substances (including but not limited to coca leaves, coca leaf derivatives, opium, opium derivatives, depressant drugs, hallucinogenic drugs, stimulant drugs, tranquilizers) and Marihuana and Marihuana concentrate all as defined in Colorado Revised Statutes 12-22-303, as amended, together with vessels, implements and furniture used in connection with the manufacture, production, storage or dispensing of such substances and articles of personal property tending to establish the identity of persons in control of contraband, related paraphernalia consisting in part and including, but not limited to utility company receipts, rent receipts, cancelled mail envelopes, photographs and keys. (Which said property is destined or intended for use, or which is or has been used as a means of committing a criminal offense or the possession of which is illegal would be material evidence in a subsequent criminal prosecution. And the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:

That I, Sgt. DeNovellis, presently assigned to the Major Peddler Unit (specialized Narcotic Enforcement Unit) of the Denver Police Department, have been involved in a narcotic investigation for the past three months involving Antonio "Pic" Munez (12-12-48). This investigation originally started when a confidential citizen informant suspected narcotic transaction at 8690 Norwich St., the residence of Antonio Nunez. During the past three months the confidential citizen informant has given license numbers of vehicles coming and going from the Norwich St. address to your affiant. The citizen informant reported to your affiant that some of these vehicles would drive up to the Norwich St. address, park the vehicle, and the occupant would go into the residence, stay a short time, and leave. The citizen informant was not able to get all of the license numbers of the vehicles going to and from the location. The citizen informant further stated that during the daytime hours a party known only as "Pat" would meet with some of these parties coming to the Norwich St. address.

On 11-3-81 your affiant received information from a different confidential informant who related to your affiant that a party named Antonio "Pic" Nunez was actively engaged in the sale of heroin at the location of 8690 Norwich St. This informant further reported that Nunez was out of town at that time, and that a party known to this informant as "Pat" was making the sales of heroin for Antonio Nunez out of a residence in the vicinity of W. 33rd Ave and Irving St. This confidential informant further reported that "Pat" would be in possession of Nunez's heroin and would be selling the heroin until Nunez returned to town. This confidential informant further

stated that "Pat" was driving a white station wagon (foreign made) and that it was usually in the vicinity of W. 33rd Ave. & Irving St. Your affiant responded to this location on 11-4-81 and observed a similar vehicle at W. Moncrieff PL. & Irving St. This vehicle had a license plate of CB-5962 (Colo.) which listed to Antonio Nunez at the Norwich St. address. All of the information given by this confidential informant has been substantiated. In addition, the white station wagon (CB-5962) has been observed at the Norwich St. address on several occasions by the citizen informant.

On 11-7-81 your affiant received information from a previously reliable confidential informant, that the said previously reliable confidential informant was at the location of 8690 Norwich St. in the past 24 hours of that date (11-7-81) and observed Antonio "Pic" Nunez with a large amount of heroin in his possession. This previously reliable confidential informant further related that Mr. Nunez was in the process of cutting (diluting) the heroin and was also putting the heroin in balloon packages. Mr. Nunez told the previously reliable confidential informant that he had just returned from Mexico and had purchased five ounces of heroin while he was there, bring the heroin across the Mexico-United States border himself. This previously reliable confidential informant is knowledgeable in the packaging and appearance of heroin and has admitted to your affiant that said informant has used heroin in the past. This previously reliable C. I. has been reliable on at least two occasions within the past 18 months, giving your affiant information involving narcotic activity, and resulting in the recovery of a quantity of heroin. (CONTINUED ON PAGE 2)

Signature of Affiant

_____

Sworn to before me and subscribed in my presence this 7th day of November, 1981, in the City and County of Denver, State of Colorado.

Affidavit for Search Warrant

/s/ Edward E. Carilli
District Judge

AFIDAVIT FOR SEARCH WARRANT (Continued)

Some of these investigations are still pending further investigation.

The information received from all three confidential sources has been cooberated [sic] through surveillance by members of the Major Peddler Unit of the Denver Police Dept. and by your affiant.

Narcotic intelligence information gathered by your affiant and other members of the Major Peddler Unit, show that Antonio "Pic" Nunez (d.o.b. 12-12-48) D.P.D. No. 144509 resides at 8690 Norwich St. and reportedly has been actively engaged in heroin trafficking and was in fact arrested for Sale of Heroin on 7-16-81.

Further, the previously reliable confidential informant related to your affiant that Nunez has made deliveries of heroin driving a motor home (license No. TZ-819) and a red Ford pick-up truck (license No. TM-7478), within the past two weeks of this date (11-7-81).

Due to the information above, it is requested that a search warrant be issued for 8690 Norwich St. and for the 1975 Ford pick-up truck (lic. No. TM7478) and for the Dodge motor home (license No. TZ-819).

/s/ Sgt. D. De Novellis, affiant

Sworn to before me and subscribed in my presence this 7th day of November 1981, in the City and County of Denver, State of Colorado.

/s/ Edward E. Carelli,
District Judge

(Filed November 26, 1982)

In The County/District Court
City and County of Denver,
State of Colorado,
The People of the State of Colorado
Before The Honorable Undersigned Judge

SEARCH WARRANT

(Immediate Entry)

To Investigator R. Waken, Adams County Sheriff, an officer authorized by law to execute search warrants within the City and County of Adams County, State of Colorado. Being duly advised that the affiant, Sgt. D. DeNovellis, has this date filed an affidavit for a search warrant in conformity with the provisions of the Colorado Revised Statutes and the Colorado Rules of Criminal Procedure for the following described property, to-wit: Controlled substance (including but not limited to coca leaves, coca leaf derivatives, opium, opium derivatives, depressant drugs, hallucinogenic drugs, stimulant drugs, tranqualizers) and Marihuana and Marihuana concentrate all as defined in Colorado Revised Statutes

12-22-303, as amended, together with such vessels, implements and furniture used in connection with the manfacture, production, storage or dispensing of such substances and articles of personal property tending to establish the identity of persons in control of contraband, related paraphernalia consisting in part and including, but not limited to utility company receipts, rent receipts, cancelled mail envelopes, photographs and keys, believed to be situated (at the place) (in the vehicle) known as: 8690 Norwich St. Adams County, Colorado, 1975 Ford P.U. TS-7478 trk. 1978 Dodge Mobile Home, Colorado License Plate TZ-819. City and County of Adams County, State of Colorado, upon one or more of the grounds set forth in the Colorado Revised Statutes and the Colorado Rules of Criminal Procedure, namely: That said property is designed or intended for use, or which is, or has been used as a means of committing a criminal offense or the possession of which is illegal would be material evidence in a subsequent criminal prosecution.

Certain property which is designed or intended for use or which is or has been used as a means of committing a criminal offense, or the possession of which is illegal, or which would be material evidence in a subsequent criminal prosecution.

Based upon the affidavit of Sgt. D. DeNovellis, which is incorporated by reference herein, I am satisfied that there is probable cause to believe that the property so described is located (at the place) (in the vehicle) above described. **YOU ARE THEREFORE COMMANDED to search forthwith the place or person described for the property described, and to make return of this warrant to the undersigned Judge within ten days**

thereof, and to deliver to the person, from whom the property is taken, a copy of this Warrant together with a receipt for the property taken, or, in lieu thereof, to leave a copy of the Warrant and receipt at the place from which the property is taken, and to deliver to the undersigned Judge a written inventory of the property taken with the return of this Warrant. You are hereby FURTHER instructed that you may enter the above described place to be searched forcibly without first knocking and announcing your identity and purpose.

Dated this 7th day of November, 1981, in the City and County of Denver, State of Colorado.

Signature of Judge

City and County of Denver
State of Colorado

RETURN AND INVENTORY

I, Sgt. D. DeNovellis, received the within Search Warrant on 11/7, 1981, and duly executed it as follows: On 11/7, 1981, at 2:35 o'clock p. m., I searched (the person) (the premises) described in the search warrant and left a copy of the search warrant with: Antonio Nunez, 8690 Norwich St. Antonio Nunez, name of person searched, or owner, or at the place of search together with an inventory of the property taken.

The following is an inventory of property taken pursuant to the search warrant:

No. 1. 15 multi (balloons)- colored balloon with suspect heroin.

No. 2. $110.00 cash from Antonio Nunez.

No. 3. $47.00 cash from wallet of Nunez.

No. 4. 685.00 cash from closet.

No. 5. 22 caliber 9321 — antique.

No. 6. Assorted multicolored balloons empty.

No. 7. Miscellaneous papers with residency of Nunez.

This inventory was made by Sgt. D. DeNovellis in the presence of Detective Salazar and Detective Ruetz and is a true and detailed account of all property taken pursuant to the search warrant.

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82 No. CR0025

In The County/District Court

The People of The State of Colorado

vs.

ANTONIO GUADALUPE NUNEZ

(d.o.b. 12/12/48)

A/K/A "PIC"

A/K/A "PICANO"

Possession of a controlled substance, Schedule I [C.R.S. 1973, §12-22-309 & §18-18-105 (2) (a), as amended] F-3

Adams County Sheriff's Office
Witness For The People

Robert Sprecher

Rick Sargene

Richard Waken

Don Johnson

Harold Frankeberger

Joseph Smith

David Lutter

Adams County Sheriff's Office
1831 East Bridge Street
Brighton, CO

Don DeNovellis

Jeff Ruetz

Gary Salazar

John Garcia

Pat Fitzgibbons

Mark Olin

Harry Mills

Denver Police Department
1331 Cherokee
Denver, CO

Permission given to file the within information this

_____ day of _____ 19____

and bail fixed at $_____.

_____

Judge.

For COUNTY COURT USE:

District Attorney recommends bond at $25,000.00.

_____

Deputy District Attorney

Bond is set at $_____.

_____ Judge

Filed in County Court, Adams County, Colo., Nov. 12, 1981
Virginia Schroeder, Clerk of County Court

The People of the State of Colorado Against

ANTONIO GUADALUPE NUNEZ
A/K/A "PIC"
A/K/A "PICANO"

SEVENTEENTH JUDICIAL DISTRICT

In The County/District Court

Paul Q. Beacom, District Attorney within and for the Seventeenth Judicial District of the State of Colorado, in the name and by the authority of the People of the State of Colorado, informs the Court, that on the 7th day of November A.D. 1981, at the said County of Adams in the state of Colorado, Anotonio Guadalupe Nunez did knowingly, unlawfully and feloniously possess a Schedule I controlled substance, to-wit: heroin; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Colorado.

PAUL Q. BEACOM, No. 3759

_____

District Attorney

State of Colorado, County of Adams ss.

Robert Sprecher, upon oath says: That the facts stated in the foregoing complaint/information, hereto attached, are true and that the offense therein charged was committed of this affiant's own personal knowledge.

/s/ Robert Sprecher

Subscribed and sworn to before me this 12th day of November A.D., 1981.

Randall S. White
Notary Public
My Commission Expires July 17, 1984
450 South Fourth Avenue
Brighton, CO 80601-3193
659-7720

Action No. 81 F 1429

District Court
County of Adams
State of Colorado

Motion For Disclosure of Deals or Compensation

People of the State of Colorado

Plaintiff,

vs.

Antonio Nunez,

Defendant.

COMES NOW the defendant by and through his attorneys KARP, GOLDSTEIN & STERN, and requests that this Court Order the Prosecution to disclose any and all deals made with the confidential informants or citizen witnesses involved in the instant case, or any compensation paid to them and as grounds therefore states the following:

1. Upon information and/or belief the confidential informants and citizen witnesses involved in the instant case have received some consideration or compensation in exchange for their services.

2. In order to defend against the instant charges, and to prepare for trial, the defendant needs to have disclosed to him any deals made with or any compensation or consideration given to the confidential informant and/or citizen witnesses who are involved in the instant case.

WHEREFORE, the defendant requests that this Court order the prosecution to disclose all deals made with and any compensation given or consideration given to the confidential informants and citizens witnesses involved in the instant case.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY:

/s/ Kenneth H. Stern (9198)
Attorney for defendant
1760 Lafayette Street
Denver, Colorado 80218
(303) 861-8580

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Motion for Disclosure of Deals and or Compensation was mailed, postage prepaid, to all other counsel of record this 22nd day of February, 1982.

By Nancy Cox

Action No. 81 F 1429

District Court
County of Adams
State of Colorado

Motion For Disclosure of Informant

People of the State of Colorado

Plaintiff,

vs.

Antonio Nunez,

Defendant.

COMES NOW the defendant by and through his attorneys KARP, GOLDSTEIN & STERN, and moves this Court to Order the law enforcement authorities involved in the instant case to disclose the name, address, and phone number of all informants employed in the instant case and as grounds therefore states the following:

1. In obtaining information which was subsequently used in the search warrant, the law enforcement authorities involved in the instant case mentioned the presence and involvement of unnamed confidential informants and unnamed citizen witnesses.

2. Both for purposes of challenging the legality of the search in the instant case, as well as defending against the instant charges, the defendant needs disclosure of the names, addresses, and phone numbers, of said informants and citizen witnesses.

3. In the interest of justice, and in order to protect the due process rights of the defendant and his right to a fair trial and the effective assistance of counsel, disclosure of the above described informants and citizen witnesses is absolutely essential.

WHEREFORE, the defendant requests that this Court order disclosure of the aforementioned informants and citizen witnesses.

Respectfully submitted,

KARP, GOLDSTEIN & STERN
BY:

/s/ Kenneth H. Stern (9198)
Attorney for defendant
1760 Lafayette Street
Denver, Colorado 80218
(303) 861-8580

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Motion for Disclosure of Informant was mailed, postage prepaid, to all other counsel of record this 22nd day of February, 1982.

By Nancy Cox

Action No. 81 F 1429

District Court
County of Adams
State of Colorado

Motion to Suppress

People of the State of Colorado
Plaintiff,

vs.

Antonio Nunez,
Defendant.

COMES NOW the defendant, by his attorneys, KARP, GOLDSTEIN & STERN by the undersigned, and

moves this Court for an Order suppressing as evidence against the defendant in any criminal proceedings, any and all statements elicited from the defendant by law enforcement officers on the date of and subsequent to defendant's arrest for the crime alleged in the above captioned action, and to suppress any and all physical evidence seized from the person, presence, vehicle and/or premises of the defendant or visual observations made by law enforcement officers, on or about the time of said arrest and as grounds for this Motion defendant states the following:

1. On or about November 7, 1981, the defendant was arrested by members of the Denver Police Department and Adams County Sheriff's Department.

2. Subsequent to the defendant's arrest, certain physical evidence was seized from the person, presence, or vehicle of the defendant, statements may have been elicited from the defendant by said officer concerning the alleged offense charged in this action and visual observations may have been made by said officers.

3. There was no probable cause to sustain the issuance of a search warrant in the instant case, the search warrant that was obtained was improperly executed, the defendant was arrested without first procurring an arrest warrant, the evidence seizured was not seized pursuant to a valid arrest nor was said seizure properly incident to or within the scope of a valid arrest and in general, the aforementioned search of the defendant's residence and his arrest took place in violation of state and federal law.

4. At the time of his arrest, statements were elicited from the defendant without the proper advisement and

said statements were not voluntarily made by the defendant.

5. Any evidence obtained subsequent to and at the time of the above mentioned arrest were the fruits of an invalid arrest and was obtained under such circumstances that its use in a trial against this defendant would constitute an illegal search and seizure and would constitute a deprivation of defendant's life and liberty without due Process of law, in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article II, Sections 7 and 25 of the Colorado Constitution.

WHEREFORE, defendant requests that this Court enter its Order suppressing as evidence against him the above described evidence and statements and all evidence which is the direct fruit of the above described evidence and statements.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY:

/s/ Kenneth H. Stern (9198)
Attorney for defendant
1760 Lafayette Street
Denver, Colorado 80218
(303) 861-8580

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Motion to Suppress was mailed, postage prepaid, to all other counsel of record this 22nd day of February, 1982.
By: Nancy Cox

ACTION NO. 81 F 1429

DISTRICT COURT COUNTY OF ADAMS
STATE OF COLORADO

MOTION TO DISMISS OR IN THE ALTERNATIVE
MOTION TO SUPPRESS

PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

ANTONIO NUNEZ,

Defendant.

COMES NOW the defendant by and through his attorneys, KARP, GOLDSTEIN & STERN, and moves this court to dismiss the above captioned case, or in the alternative, to grant the defendant's previously filed Motion to Suppress and as grounds therefore states the following:

1. On September 9, 1982, a hearing was held on the defendant's Motion to Disclose Confidential Informant.

2. At the September 9, 1982, hearing, the court ordered the district attorney to disclose the name of said informant in that his testimony was relevant and necessary to a fair adjudication of the defendant's Motion to Suppress Evidence.

3. On September 24, 1982, the district attorney announced to this court that the name of the confidential informant would not be disclosed.

4. In response to the district attorney's decision to not disclose the name of the confidential informant, the

court should dismiss the above captioned criminal prosecution, or in the alternative, must grant the defendant's Motion to Suppress Evidence.

WHEREFORE, the defendant prays that this court enter its order either dismissing the above captioned case or granting the defendant's Motion to Suppress Evidence.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY:

/s/ Kenneth H. Stern (9198)
Attorney for defendant
1763 Franklin Street
Denver, Colorado 80218
(303) 861-8580

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Motion to Dismiss or in the alternative Motion to Suppress was mailed, postage prepaid, to all other counsel of record this 27th day of September, 1982.
By: Mary Shiner

DISTRICT COURT, ADAMS COUNTY, COLORADO
Criminal Action No. 82CR0025, Division E

REPORTER'S TRANSCRIPT

Filed in the Supreme Court of the State of Colorado
Oct. 27, 1982. David W. Brezina, Clerk.

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant.

The hearing in this matter commenced on Thursday, September 9, 1982, before the HONORABLE PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado.

FOR THE PLAINTIFF:

OFFICE OF PAUL Q. BEACOM
DISTRICT ATTORNEY, ADAMS COUNTY, COLORADO

450 South Fourth Avenue
Brighton, Colorado 80601

By: JEFFREY L. ROMEO, Registry No. 8454
Deputy District Attorney

FOR THE DEFENDANT:

KENNETH H. STERN, Registry No. 9198
1763 Franklin Street
Denver, Colorado 80219

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(p. 3) (Whereupon, the following proceedings were commenced at the hour of 3:00 p.m.)

The Court: People of the State of Colorado versus Antonio G. Nunez, 82CR0025.

Mr. Romeo: Good afternoon, Your Honor. Jeff Romeo for the People.

The Court: Thank you, Mr. Romeo.

Mr. Stern: Good afternoon, Your Honor. Kenneth H. Stern, 9198, appearing on behalf of the Defendant who is on bond and present in court this afternoon.

The Court: Thank you, Mr. Stern.

Mr. Romeo: Your Honor, there have been a number of motions filed by the defense. It's basically the People's position that they have the burden of going forward on all of these motions. They feel we may have some limited burden to go forward. I'll leave that to the Court's discretion if we have any burden to go forward at this time. I think many or all of these motions can be handled by legal argument alone, and as such I'm ready to proceed.

Counsel has informed me that he wishes to put on testimony, he wishes to attack the veracity of the warrant itself. Unfortunately, his motions fail to comply with the rules as far as attacking veracity of the warrant, and as such I'm going to be objecting to that. Also, he states he's going to call witnesses who are not endorsed to me. And if the Court wants the (p. 4) case law on that, I'd be prepared to give that to the Court.

The Court: What about this motion for return of property, Mr. Romeo. Do you have a position on that?

Mr. Romeo: Your Honor, I do. I think Sergeant DeNovellis has released many of the things that Mr. Nunez has requested be returned. The 35 millimeter Canon AE1 I don't think they ever had, thus they can't return it; miniature Minox camera, they never had that; keys to home and vehicles, they state they left those at the residence; personal papers, obviously we're going to keep those as evidence in this case to show occupancy. And once the case is over with, depending on the appeal status of the case, if any, those may or may not be returned. But I think they are evidence in the case, and we may use those as evidence in the case.

I know Sergeant DeNovellis has told me that he released numerous other things which in fact were not even in the Motion for Return of Property previously. In fact those were picked up by the Defendant on a previous occasion. So basically A through C, the police don't have those items. And D, we are going to keep personal papers as evidence in this case.

The Court: Mr. Stern?

Mr. Stern: Your Honor, with respect to the Motion for Return of Property, I don't know what the Court can do about that at this point in time. There have been numerous items returned, and we appreciate their being returned. The additional (p. 5) items that the Defendant seeks, there is a claim being made that they were never taken; and I don't know how we're going to resolve that: specifically, two cameras — I think a Minolta and a Minox. One is a miniature camera and the other is a 35 millimeter camera — and keys to various pieces of personal property.

I know it's Sergeant DeNovellis' recollection that he left the keys in the motor home. But when Mr. Nunez looked for them in the motor home immediately after being released from bond, they were not present. Also, there were two cameras there prior to the excution of the search warrant that were not there after the execution. However, I know that Sergeant DeNovellis and the other officers maintain that they did not come across those cameras. So that's why I at this point in time was not going to pursue the Motion for Return of Property any further than it had been pursued already based upon that impasse. However, if that impasse is ever broken and the whereabouts of these items are discovered and

they do happen to be in custody, we would at that point resubmit the motion and request that these items be returned.

The Court: All right.

Mr. Romeo: I don't have any problem with that, Your Honor.

The Court: I think that's [emminently] reasonable.

Mr. Stern: Your Honor, may I respond to the two things (p. 6) the District Attorney brought up?

The Court: Sure.

Mr. Stern: The latter thing being we did intend, on the Motion for Disclosure of Informant, to have two brief witnesses if the Court felt it was necessary and if we are not able to stipulate to the substance of what their testimony would be. I didn't think that this would be a big issue of contention. And in fact if it's going to be an issue of contention, then there are numerous other witnesses from out of state who the defense would seek to bring in to testify on these matters. However, since the affidavit itself seems to indicate there was no factual disagreement, I just wanted to make sure I had two witnesses available to cover the point should the Court want to hear testimony.

I would agree with the District Attorney's Statement that one of the witnesses would involve calling the Defendant for a limited purpose. The other witness is the Defendant's son. I did not file any paper formally endorsing the son as a witness. I would concede that readily. I was not aware that was required for the Motion to Suppress, and I apologize to the Court and to

the District Attorney. And if that would raise any inconvenience or in any way affect the outcome of this hearing, I would be open to considering resetting it. But I don't really think that's going to be necessary.

Mr. Romeo: Your Honor, in that regard, the problem (p. 7) I have, any time there's a Motion for Disclosure of Confidential Informant, that's a serious matter. People are kept as confidential informants for obvious reasons, for their safety, things like that, particularly in Mr. Nunez' case. He has charges pending against him on intimidation of a witness on a prior case. He's been —

Mr. Stern: Your Honor, I'd object to that statement. First of all, it's a mere allegation that has not been substantiated. It involves a person who already had testified and whose testimony was not pending, nothing to do with confidential informant. And I don't think that that should have any bearing on this case.

The Court: All right.

Mr. Romeo: Well, the People do, Your Honor. I think it goes to the balancing test and would go to the balancing test involved in any disclosure.

If you are going to attack the veracity of an affidavit, go beyond the four corner — the general test is you stay within the four corners. If you go beyond it, there's certain things you have to do. Under *People v. Dailey,* Brief Times Reporter, Volume VI, page 58, January 25, 1982. the Supreme Court of this state has set out the procedure you must follow in the state of Colorado to attack the veracity. And there are two very explicit, very specific, "you must do's." One, that the Motion to Suppress for a veracity hearing be supported by (p. 8)

one or more affidavits reflecting a good-faith basis for the challenge. Two, must contain specification of the precise statements challenged. And the reason the Court goes on to say that is they want to make sure that these are not filed frivolously or as a matter of course, that there be some good-faith basis. Two, that the prosecution is given a chance to be able to rebut these.

Neither has been complied with in this instance. As such, I don't think the Court should even be hearing anything about veracity hearings or going beyond the four corners in anything beyond what the motion itself states for disclosure of informant. Thus, that's why I say really legal argument is all that's required in this regard.

If the Court decides that for some reason counsel can in fact go ahead with this at this time or at some later time, counsel's informed me that really from his statements that he says the affidavit is correct in what it says. Thus, he doesn't feel he needs any witnesses, but he's going to put them on. I'm not really sure exactly really what it goes to.

He talks to me in one instance that the Defendant says he was on a hunting trip when in the affidavit the confidential informant says Mr. Nunez says he was down in Mexico. If that's the evidence they're going to put on, the affidavit makes it clear that he was out of town — the police agree he was out of town — and made it clear to the magistrate who reviewed the (p. 9) affidavit that he was out of town for some period of time.

Whether Mr. Nunez was on a hunting trip and told the confidential informant he was in Mexico is really not relevant. In fact, Mr. Nunez may have told one per-

son one thing and in fact been doing something else. That really doesn't affect the affidavit. And if that's really all he's going to put people on to testify about, I really don't see any significance in that as far as with the veracity of the warrant or in fact testing it in any fashion. That's really all Mr. Stern has talked to me about as far as testing the veracity, so I'm not really sure that that really has any relevance here today anyway if the Court were to allow him to go ahead.

The Court: What about the allegation by the District Attorney that you didn't meet the tests set forth in *Dailey* which I understand to be the law?

Mr. Stern: Your Honor, the information that led to our wanting a challenge of veracity was obtained subsequent to the filing of the Motion to Suppress. I should have filed an amended Motion to Suppress which I did not do. I don't know what I can say to the Court beyond that except I would request an opportunity to so amend my Motion to Disclose or Motion to Suppress.

Really, Your Honor, the calling into question of the credibility of only one of three confidential informants — there are three confidential informants. One's veracity is being (p. 10) called into question based upon the fact that Mr. Nunez was out of town on a deer hunting trip for the period of time preceding the filing of the affidavit and preceding his arrest. Only one of three confidential informants really describes any criminal conduct to Mr. Nunez particularly. The other two talk about cars, stopping. Perhaps the Court doesn't want to hear this argument and wants me only to address the amending of the motion.

The Court: One problem I have is the affidavit doesn't appear in this file. The search warrant appears in the file. The affidavit, upon which the search warrant is based, doesn't appear in the Court's file.

Mr. Stern: I have a copy, Your Honor.

Mr. Romeo: Your Honor, I also have a copy of the search warrant. In fact this may be the original. If I can tender this to the Court at this time.

The Court: Well, I've got the search warrant.

Mr. Romeo: There's also the affidavit with that.

The Court: Okay. That's what I'm missing here.

Mr. Romeo: In fact that does look like an original.

The Court: Well, I think if you're going to attack the veracity and go outside the four corners, that we're going to have to have compliance with *People v. Dailey*. I'll permit you to amend that. When is the matter set for trial?

Mr. Stern: October 28, Your Honor.

Mr. Romeo: Your Honor, if the Court is going to allow (p. 11) that, if we could have an offer of proof at this time. As I say, from what Mr. Stern has told me so far, I don't really see that as being that relevant as to veracity. He may see it as being relevant. I don't. If he can maybe make an offer of proof as to what these people will testify to.

The Court: Okay.

Mr. Romeo: Maybe that —

The Court: That's fine. Maybe we can get it handled today.

Mr. Romeo: I'd just as soon handle it today if we could.

Mr. Stern: If I may take a moment to explain. Two places in the affidavit — one place, if I may get a copy of the affidavit. It states that the confidential — again, there are three informants involved in this search warrant. Informant No. 1 testifies that numbers of vehicles would park their car, go into the residence, and leave a short time afterwards and also indicates that some license numbers were given. However, who those license numbers relate to and what evidence that is of criminal conduct is not gone into any further. We're not questioning that information from the citizen informant.

The second confidential informant talks about activities of a Pat Nunez on October 3, 1981. And that confidential informant does indicate that he believed Mr. Nunez was out of town at that time.

(p. 12) Finally, the third confidential informant states a number of things. And he is the only individual who allegedly observes Mr. Nunez involved in any criminal conduct. Number one, he says that Mr. Nunez makes a statement that he had just come back from Mexico and had obtained 5 ounces of heroin and had brought it across the border himself. On the second page it says that within the previous two weeks, Mr. Nunez had made deliveries of heroin, driving a motor home and a red Ford pickup truck.

Finally, Your Honor, in the deposition of Sergeant DeNovellis that was taken in another matter which I

only received two days ago, there's testimony that this third confidential informant allegedly made these observations on November 6. And I asked what particular time they were made, and Sergeant DeNovellis claiming an informant's privileges are respected and said he couldn't give me that information but it was on November 6.

We are prepared to put on testimony, and perhaps some guidance from the Court would be helpful because there are numerous other witnesses we could call on this point from out of state, from out of the metropolitan area, and otherwise we couldn't bring today because there wasn't enough time set aside for it. We didn't know if this was a turning point in the Court's determination.

We brought two witnesses who will testify Mr. Nunez (p. 13) was gone the week prior to this, that he did arrive home on the 6th, that he was home on the 8th, and only immediate family were there, immediate extended family, all of whom who could be brought in to testify he was there on the 6th, nobody else was there, and none of these activities was taking place.

And this is the key aspect or the sole element in the affidavit that really ascribes any criminal conduct to Mr. Nunez. And there is abundant case law, Your Honor, that if you can call the credibility or veracity of the informant into question, then that's one basis for requiring the District Attorney to release or disclose the identity of the confidential informant so that person can be called to testify to see if that person's statements that were made to the affiant were accurate.

We're not questioning the affiant's credibility, Sergeant DeNovellis' credibility. It's just whether this—

The Court: I understand.

Mr. Stern: Anyway, it's a crucial point in the affidavit. In a sense, it goes more to the disclosure of the informant so we can then call the informant at the suppression hearing than the Motion to Suppress itself. Again, I apologize. I was not aware of a case, and I simply do conform with the dictates of a case. Your Honor, I have the most recent confidential informant case, the one Judge Quinn did I believe.

The Court: No. Thank you.

Mr. Stern: That is — I have the *Bueno,* and I am (p. 14) referring to the *Bueno-Arhuletta* case.

The Court: I think *Bueno* is the most recent unless there's been one handed down since *Bueno.*

Mr. Romeo: No, not that I know of.

Your Honor, just briefly. From the statements in fact counsel said he's not questioning the officer's truthfulness in this regard. I think if you also look at *Daily,* it's the Defendant's burden to show that a false statement was knowingly, intentionally, or recklessly disregarded by the affiant in the warrant. And if that false statement is used for probable cause and that's established by the Defendant by preponderance of the evidence, then he would have the right to have it stricken and then the Court would still have to look at the four corners.

Here he's not alleging that. And *Dailey* goes on to talk about if the error is an error that's been caused by purjury by the informant or from some other fashion, that's not necessarily the case, it's not necessarily true

that the statement then must be stricken from the record. Only if the Court finds that the officer lied or made an intentional, knowing, or reckless disregard for the truth, then it must be stricken. Otherwise that's not mandated.

That really seems to be the situation that counsel is alluding to, that he's saying the officer didn't make any falsehoods, didn't disregard anything recklessly, but if anything was done, it would have had to have been done by the confidential (p. 15) informant. And as such, I don't think in this regard the Court would have to eliminate it from the warrant and in fact shouldn't eliminate it from the warrant.

The statement he talks about from the informant — first of all, there was from the second informant information received about dealing by Mr. Nunez and dealing heroin. On the third informant, the statement about him being gone, whether he was on a hunting trip or really was in Mexico, really doesn't matter. The affiant says he was told by Mr. Nunez that he was in Mexico. And if Mr. Nunez makes those statements to people, he's stuck with them.

The statement is that in fact he was home within the past 24 hours of the execution of this warrant, and that in fact coincides with what the confidential informant says. On one hand, Mr. Stern says he's going to put on evidence that in fact no heroin dealing went on. Well, in fact we have, once Mr. Nunez is arrested, the evidence of heroin. And although that does not in and of itself make probable cause, I think that substantially weighs against testing the veracity or releasing the name of a confidential informant. I think those are two different tests. The fact heroin is found doesn't support a bad

search warrant. But when you found hereoin just as a confidential informant says it is found, I think that supports the veracity of the confidential informant.

Mr. Stern: If I may respond briefly. My statement (p. 16) about Sergeant DeNovellis — I have no information at this point or presented to the Court he intentionally made any misstatements. I think if we get the confidential informant disclosed and show he was in fact not at the Nunez residence on the 6th, that would cut to the heart on the Motion to Suppress and, second of all, that there was recklessness on the part of the affiant is not verifying the information or checking out the information.

(Pause.)

The Court: Mr. Romeo, I'm not clear as to whether or not you wanted me to consider the offer of proof as being sufficient under *Dailey* to take the place of the affidavits that are required in *Dailey* so as to proceed with a hearing in this matter today. I'll do one of two things. I'll either do that, or I'll permit Mr. Stern an opportunity to amend his Motion to Suppress, furnish the affidavit, giving you the information on which he's going to rely from the witnesses, and set this matter down for another early hearing. Or I'll proceed on the basis of accepting an offer of proof in lieu of an affidavit.

I think the law doesn't favor, as I understand it, the concealing of the identity of informants in situations such as this provided that the defense, according to Justice Quinn's reasoning in *The People v. Bueno,* which is June 21, 1982, Volume VI of the Brief Times Reporter, page 522 — Quinn says, "Our cases generally have

addressed two common situations involving (p. 17) the informer privilege. The first situation involving disclosure arises in connection with a defendant's motion to suppress evidence," which you apparently have here. "If the disclosure of an informant's identity is essential to a fair determination of a suppression motion, then the trial court in its discretion may order disclosure. . . . Disclosure, however, is not automatic upon request. A defendant seeking disclosure must make an initial showing that the informant will provide information essential to the merits of his suppression ruling. . . . (where defendant makes initial showing of good faith basis in fact to question accuracy of affidavit containing recitals of unnamed informant, court may order disclosure of informant's identity). . . ."

It then goes on further to say that "Thus a defendant will meet this initial burden when he establishes a reasonable basis in fact to believe that an informant does not exist or, if he does, he did not relate to the police the information upon which the police purportedly relied as probable cause for an arrest or search."

Now, if I accept the offer of proof that counsel has made in lieu of those affidavits, it seems to me that he's established that.

Mr. Romeo: I don't really think so, Your Honor. I think if you read the last part you read, the last sentence you read — and I don't have exactly where you were reading in *Bueno*. (p. 18) I do have a copy of that.

The Court: It's on page 523 on the far right-hand side of the page about two-thirds of the way down starting, "Our cases generally have addressed . . . ."

Mr. Romeo: All right. I do have that. I think what the Court again talks about — they cite *People v. Quintana* where there is presented to the trial court evidence of the lack of credibility of affiant or his officer-informant.

The Court: I'm not concerned about Detective DeNovellis' credibility. I don't think that's in question at all.

Mr. Romeo: Exactly. And I think that's the distinction the Court makes, that if there's an offer of proof that the confidential informant did not say what the affiant says he said or that the officer recklessly disregarded the truth, then in that situation disclosure is rather important. Here I don't think that's the situation. What they're saying is the informant may or may not have told the truth to the affiant. And I think what *Dailey* makes clear is that's a very different situation. The fact that there may be some inaccuracies of the informant themselves, that goes behind a warrant and as such that material, even if proven, need not be stricken from the warrant. And as such, the Court can in fact consider that in the warrant.

The reason for that is that all the protections of (p. 19) the Fourth Amendment, the neutral detached magistrate, the officer telling the truth as best he knows it, all the protections that the Fourth Amendment can give any citizen, have been complied with. And the fact some person lied to an officer, even assuming arguendo that were true, suppressing evidence or disclosing of an informant really does no good at that point in time. It does not further the ends of the Fourth Amendment particularly in any fashion. It merely subjects con-

fidential informants to disclosure and obvious risk of harm, a risk which we think is very great in these cases.

Thus, I think they're two very different situations where the defendant has to make out his burden by a preponderance of the evidence and not merely just a minimal showing that the officer is lying or recklessly disregarded the truth. And counsel is really not stating that. And the situation that we have here is where he's alleging maybe the confidential informant was either wrong or lied to the officer in some fashion. In that case that would require disclosure of informants every time because every—

The Court: Well, I'm not sure. If it goes to his Motion to Suppress and he's entitled fairly to have that information, I think probably it will.

Mr. Romeo: Well, I think then the rule would literally be any time there's a Motion to Suppress, you would always say, "Judge, the confidential informant said something that (p. 20) wasn't true." Thus, we always get disclosure of the confidential informant.

The Court: If counsel stated to me, and I assume what would be furnished in the affidavit if the affidavit had been furnished, is so and so on information and belief states that on November 6 there was no one present at the Nunez residence except members of the Nunez family and consequently the information that Officer DeNovellis relied upon from the confidential informant, which was alleged to have been obtained on the 6th, could not in fact have been obtained on the 6th—

Mr. Stern: May I respond just briefly? There's two issues I guess. One is have I followed the rules in supply-

ing the affidavits; and if not, does either Mr. Romeo want to rely on my statement or does he want me to furnish the affidavits. The other thing is the merits of the argument they require to disclose or do not require. However, if I could say and point out one very important thing just briefly. Three informants, the second one only —the first one says nothing I would interpret as criminal. The second one says that—well, one, Mr. Nunez is out of town and a party known to this informant as Pat is making sales of heroin for Antonio Nunez. This person later says would be in possession of Mr. Nunez' heroin. It doesn't say Mr. Nunez is saying anything. The only person is this third informant which says three things which we could present evidence I think that would satisfy Your Honor, that would carry the (p. 21) burden that there is a good-faith reason to believe what this person said could not have possibly happened. And, therefore, I think it would be incumbent upon the Court to order disclosure so we could have this alleged informant in court to say, well, I did say this or I didn't say this or I said this and it was changed to this, to find out exactly what did happen. Otherwise, how would a Defendant—

First of all, this is the first time I've ever in any of my criminal cases attacked the veracity of an informant in this way. And I don't know if it's the Court's experience to rule in this case that disclosure as afforded by the law would open up some floodgate of questioning confidential informants. I've never done it before. I don't know what the Court's experience is. All I know is we have a confidential informant or an affiant saying a confidential informant allegedly told him things that

could not have been true. And how else can we prove or get to the bottom of what happened without getting that informant disclosed?

But, again, I'm not asking for the Court to make a ruling on disclosure. Now, if the District Attorney would like me to comply with the procedure and file the affidavits—and I apologize for not doing that.

The Court: That's what I'm trying to find out.

Mr. Stern: Also, Your Honor, I'd add I can get them in as quickly as possible.

(p. 22) (Pause.)

Mr. Romeo: Well, I'm in a difficult position, Your Honor. What I would like is to have the Court obviously rule that the rules weren't followed, the procedure wasn't followed, and the Court is not going to consider that. The Court has preliminarily said the Court is not going to rule that way. And that would be my initial request, that the Court rule that since the procedure has not been followed, the Court is not going to allow the test of veracity of the affidavit. I'd have to admit I'd much rather have the affidavits be filed, but I think I'd like to proceed today on this, get any testimony we have to get.

If for some reason we have to continue this hearing —and I would hope that that would not be the case—I may request of the Court time to present additional evidence. But if we can finish it today, I'd just as soon try and finish it today.

TheCourt: All right.

Mr. Romeo: Briefly in response though. I'd just note the second informant relates that—and the Court

can read it—that Mr. Nunez was actively engaged *in the* sale of heroin at his address, something that's left out every time by defense counsel. But let's not get into the actual argument right now of whether the confidential informant should be released or not released.

Mr. Stern: Your Honor, my problem only is that if (p. 23) the confidential informant is going to be disclosed for the purpose of the Motion to Suppress, I'd like to have that witness be present so he could be questioned. Now, I'd have no problem with taking the testimony of the officers and continuing it for the testimony of the confidential informant should the Court order disclosure.

Mr. Romeo: Well, I can cut that a little short. I think, realistically, Judge, the informant is not going to be disclosed. I really don't want to kid anybody about this, realistically. And that's why these motions are usually filed. The officers fear for the safety of this person. They're not going to disclose him. If the Court in some discretion feels that's appropriate, then in fact we'll have to appeal that. If the Supreme Court decides, yes, in fact that is appropriate, the case will probably be dismissed. And in fact I think that's the whole purpose of filing these motions. In Denver there's a raft of them, and I'm sure there will be a raft of them from now on in this county. But I'm ready to go ahead today and leave it to the sound discretion of the Court once the Court hears the evidence.

The Court: All right.

Mr. Stern: Your Honor, I'm a little unclear at this point. Are we going to have evidence on the motion to disclose informant? Because if the Court rules that the

informant is to be disclosed, we would like the informant to testify at the (p. 24) Motion to Suppress as well—

The Court: Now, I understand that, Mr. Stern. I've heard it four times. Believe me, I've got it.

Mr. Stern: I'm sorry. I'm just not sure what evidence the Court wants to go ahead with at this point.

The Court: Mr. Romeo, what would you be proceeding to do at this time?

Mr. Romeo: Your Honor, it's now the Defendant's burden to go forward, present evidence to give information to the Court as to any challenge to the veracity of the search warrant in this regard and the officer's veracity.

The Court: All right. You may call your witness.

Mr. Stern: Your Honor, if I can make a five-second opening statement. That is on the Motion to Suppress itself. There are two grounds, and one I spent a good deal with already. The second is what I believe to be a warrantless search of the Defendant at his residence which, based upon the fact that it's a warrantless search, I don't believe that we have a burden. I don't have any problem calling witnesses for a practical problem. But when it comes time to rule on that, I believe the burden rests with the People on showing the legality of a warrantless search. However, I'm prepared to call all the witnesses, and we can worry about the burden when it comes time to make a ruling on the case.

The Court: Well, as I understand it, the witnesses (p. 25) you are going to call now would be in the same position as if you'd filed the affidavit setting forth their

names and what it is that you rely upon to go outside the four corners of this affidavit for the search form to support your position that the identity of the confidential informant has to be disclosed. Those are the witnesses I'm prepared to listen to.

Mr. Stern: Not the other witnesses about the warrantless search at this time? I don't mean to—I'm not—

The Court: You may proceed, Mr. Stern.

Mr. Stern: All right. Your Honor, I would call Mr. Nunez to the witness stand for the limited purpose of establishing evidence and request that the Court enter an order limiting the cross-examination into those matters and not into the subject matter of the crime itself.

The Court: All right.

Mr. Stern: Also, at this time I'd move to sequester the witnesses if I could if the Court feels it's appropriate.

Mr. Romeo: That's fine, Your Honor. I'd keep Sergeant DeNovellis as our advisory witness.

The Court: All right. Anyone else who is going to be a witness in this case is sequestered. Please leave the courtroom. Do not discuss your testimony among yourselves or with any other person in this case.

Mr. Stern: Thank you. I'd call Mr. Nunez to the witness stand.

(p. 26) The Court: Mr. Nunez, please come forward. Be seated in the witness chair to my right.
Whereupon,

ANTONIO GUADALUPE NUNEZ

was called as a witness on behalf of the defense and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stern:

Q. Please state your name and your address.

A. Antonio Guadalupe Nunez, 8690 Norwich Street, Westminster, Colorado.

Q. Mr. Nunez, directing your attention to the fall of 1981, did you have occasion at that time to go on a hunting trip?

A. Yes, I did.

Q. Do you recall the date that you left on the hunting trip?

A. I left October the 31st, on Halloween, about 12 noon.

Q. And who went on this hunting trip with you?

A. My father, Luis Nunez; Albert Gonzales, Shawn Nunez; Javier Rivera; and myself.

Q. What is the relationship of these individuals to you?

A. Luis Nunez is my father. Albert Gonzales is a friend. Shawn Nunez is my son. Javier Rivera is my nephew.

Q. And where did you go on your hunting trip?

A. We go about 14 miles southwest of Hartsel. It's (p. 27) towards the Climax mine or Amax, Climax, either one they call it.

Q. And what vehicle did you take to go on your hunting trip?

A. A 1978 Dodge motor home.

Q. When did you return from the camping trip?

A. I returned on November the 6th early in the morning, about two in the morning, three in the morning, somewhere in there.

Q. Did you catch any deer?

A. No.

Q. Now, while you were up there, did you have an occasion to frequent any bar or cafe in the evening?

A. We usually go to Mrs. Kitty's place. That's what we call it, a lot of deer hunters. We go there almost every night except on Tuesdays. On Tuesdays they're closed.

Q. And did you go to that bar or cafe during this period of time?

A. Yes, I did.

Q. And would there be individuals from that cafe or bar who could come and testify to that fact?

A. Yes, they will.

Q. Now, what did you do after you returned on November the 6th at two or three in the morning?

A. I unpacked the rifles that night—early in the (p. 28) morning, night, what you'd call it. I unpacked the

rifles, took them in the den, and put them in the closet and made sure every bullet in the—the rifles were empty and everything. I left some sleeping bags in the motor home. Rifle cases I had left in the motor home. And I did unpacking. And then after that, I took my shower and—staying up there seven days, you smell quite a bit. You have to sponge bath in the stream. So I took a shower, bathed, stood in the bathtub for about an hour and a half, and then laid down and watched TV. I was exhausted.

Q. And did you subsequently fall asleep?

A. I fell asleep.

Q. And when did you wake up, if you can recall?

A. I would say about 4 o'clock that afternoon.

Q. That would be the afternoon of the 6th?

A. Right.

Q. Were your kids home all day on the 6th?

A. Yes. My boys were home. My boy, Shawn, was home. And Javier, my nephew, was home.

Q. And they did not go back to school the Friday after returning from the camping trip?

A. They did not.

Q. And during the day on that Friday, did anybody come visit you?

A. Nobody.

Q. And that night did anybody come visit?

(p. 29) A. Only my relatives.

Q. And which relatives were they?

A. My sister-in-law, Angela; my mother-in-law, Marty; my brother-in-law, Mike; my nephews and nieces came over, my father and my mother came over to the house that night.

Q. And what was the purpose for their coming over?

A. It's just to see how everything went, deer hunting, and see if we did bring any meat to share the deer with them or elk.

Q. And would each and every one of those individuals be willing to come—

Mr. Romeo: I'm going to have to object to this line of questioning, Your Honor. It's totally irrelevant.

The Court: I'll sustain the objection.

Q. (By Mr. Stern) Did you at any time during this period of time travel to Mexico?

A. No.

Q. Did you ever at any time during this period of time tell anybody you were traveling to Mexico?

A. No, I haven't.

Mr. Stern: One moment, Your Honor. (Pause.) I have no further questions, Your Honor.

The Court: All right.

Cross-Examination

By Mr. Romeo:

(p. 30) Q. Mr. Nunez, have you ever been convicted of a felony?

A. Yes, I have.

Q. Would you please tell the Court what felonies you've been convicted of.

A. It was conspiracy of a counterfeit obligations through the federal court.

Q. When was that conviction, sir?

A. That conviction was back in 1979, I was convicted and sentenced in 1980 of—January the 9th of 1980. I took myself into Arizona, federal camp, turned myself in to the federal camp, and committed myself in there.

Q. And when were you released from—

A. I was released as—officially I was released July the 12th of 1980 into a half-way house.

Q. Are you still on parole for that offense?

A. No. As far as—not that I know of.

Q. Have you ever been convicted of any other felonies?

A. Of what? Pardon?

Q. Any other felonies?

A. Well, I was convicted of a speeding, careless driving—

Q. No. Felonies, Mr. Nunez.

A. I don't know—a simple assault. Is that a felony? That's when I was 16, 17 years old.

Q. Let me ask you this: Do you remember in 1966 in (p. 31) Greeley, Colorado, being convicted of burglary and receiving two years' probation?

A. That's when I was 15, 16 years old. Yes, I remember that one.

Mr. Stern: Your Honor, if that was a juvenile offense, I'm going to object—I don't think it's a proper basis for cross-examination. I ask that it be stricken.

The Court: I don't know whether it was or wasn't.

The Witness: That was a juvenile offense.

Mr. Stern: If I may voir dire on that, Your Honor?

Mr. Romeo: Well, if I could finish.

Q. (By Mr. Romeo) Were you convicted in adult court? Do you know?

A. Only as a—with the federal department.

Q. Let us ask you this: Do you remember in 1970 being convicted under 8 U. S. C. 1325 of illegal entry and receiving five years' probation with supervision?

A. That was a misdemeanor.

Q. That was a misdemeanor and you received five years?

A. Yes, it was.

Mr. Stern: Your Honor, again I ask that be stricken since misdemeanors aren't proper.

The Court: Well, a misdemeanor that carries five years of probation sounds a lot more like a felony to me than—

The Witness: Your Honor, it was a misdemeanor. And (p. 32) my probation officer was Richard Tinsley in the United States federal court and which I have worked

closely with him during that time. It's strictly a misdemeanor. That's what they said down in Texas. I was in El Paso, Texas, and it was considered a misdemeanor, aiding and abetting aliens.

The Court: All right. I don't know.

The Witness: They gave me the youth act. That's why. Six months, six years. Instead of that, they gave me five years of probation. And I did—I did—I was let out early. I did four years under that, and they gave me one year for good—for doing real good. And that's what happened.

Q. (By Mr. Romeo) So you actually did four years?

A. On probation, yes.

Q. Oh, you did four years of probation?

A. Yes.

Q. You were convicted under the Youthful Offenders Act?

A. Yes. At the time. With five years of probation.

Q. Sounds like felony to me. All right. Mr. Nunez, you've been previously arrested for sale of heroin; is that correct?

Mr. Stern: Your Honor, again I'm going to object to arrests that have not resulted in convictions for not being proper for cross-examination.

Mr. Romeo: I think in this case it is, Your Honor. Here the veracity of this Defendant is at issue. This Defendant (p. 33) is saying, hey, I never sold any heroin,

never had anything to do with any heroin. For this limited purpose in this limited situation, I think it's appropriate. I think it goes to his motives for testimony, his actions, and I think the Court can judge his credibility. In fact I think it is appropriate in this particular instance.

The Court: I'm not sure that evidence of conviction of anything other than a felony is admissible. I'll sustain the objection.

Q. (By Mr. Romeo) Mr. Nunez, you are currently and probable cause has been found on an intimidation of a witness case; is that not correct?

Mr. Stern: Same objection. No conviction.

Mr. Romeo: Your Honor, again here—

The Court: Well, I'm concerned about that enough that I'll permit that.

Mr. Romeo: Thank you, Your Honor.

Q. (By Mr. Romeo) Mr. Nunez, isn't a fact you've had a preliminary hearing and been bound over to the district court on an intimidation of a witness case?

A. Well, as far as to me, you would have to discuss that with my other attorney, Joe Saint-Veltri.

Q. You're in the district court; is that not true?

A. You would have to discuss it, okay, sir, with Joe Saint-Veltri.

(p. 34) Mr. Romeo: Your Honor, I ask the Court to order him to—

The Court: Answer that, Mr. Nunez.

A. (By the witness) Yes, I'm bound.

Q. (By Mr. Romeo) You're in the district court in that case?

A. Yes.

The Court: He's answered "Yes."

Q. (By Mr. Romeo) You're set for trial on that case?

A. Yes.

Q. That was intimidation of a witness on your prior heroin sale case?

Mr. Stern: Your Honor, I would have to object—

Q. (By Mr. Romeo) The wife of the witness to your heroin sale case?

The Court: I think we've gone far enough.

Mr. Stern: I represented the other. This has nothing to do with any case of Mr. Nunez. It has to do with the brother of Mr. Nunez.

Q. (By Mr. Romeo) Your brother is Juan Nunez?

A. Yes.

Q. You're familiar with a person by the name of Kathy Ontiveros?

A. Yes.

Q. You're aware she's a heroin addict?

(p. 35) A. I guess so.

Q. She possesses heroin?

A. Pardon?

Q. She possesses heroin from time to time?

A. I don't know. I don't live with her.

Q. You're aware she's been convicted of possession of heroin?

A. I know she went to court on it and that's all.

Mr. Stern: Can I ask what the relevance of Kathy—

Mr. Romeo: We'll get to it right now.

Q. (By Mr. Romeo) Kathy Ontiveros came over to your house on November 7; is that not correct?

A. Probably—yes. She came on the 7th, right?

Q. Yes, she did. And the officers were there?

A. Right.

Q. You returned November 6 at 2 a.m. in the morning?

A. Right.

Q. And you were there the whole day?

A. Right.

Q. You said other people came over to your house?

A. Relatives, yes.

Q. Those are other people, are they not, Mr. Nunez?

A. Right.

Q. They are not your immediate family, your wife or children?

(p. 36) A. Immediate family to me is all my relatives, immediate family.

Q. Mr. Nunez, the people that came over were not merely your wife or children?

A. My wife and children were there.

Q. But other people came over?

A. My mother-in-law came over, my father came over, my mother came over.

Q. And who else came over?

A. My sister-in-law came over, my nephews and nieces came over, and my brother-in-law came over.

Q. All these other people came over to your house; isn't that right?

A. All these people came over.

Q. How old is your brother-in-law?

A. Michael Torres is about 29.

Q. Your sister-in-law?

A. She's about 24.

Q. Nieces and nephews, how old are they?

A. 8, 7, and 9. And my nephew lives with me. He's 15.

Q. Mr. Nunez, if you were working on any heroin at that time, those people may have seen you; isn't that right?

A. Pardon?

Q. If you were working on heroin at that time, those people may have seen you?

(p. 37) A. Rephrase your question.

Mr. Stern: Your Honor, I think that assumes a fact not in evidence.

The Court: I don't think it does. I think—

Q. (By Mr. Romeo) Mr. Nunez, if you were working on heroin, those people may have seen you?

A. What do you mean by that?

Q. Exactly what I said, Mr. Nunez.

A. I really don't know what you're trying to say.

Q. Do you know what heroin is, Mr. Nunez?

A. No, myself.

Q. You have no idea what heroin is?

A. No. I only know it by TV, television, newspapers.

Q. You haven't heard the word?

A. And whatever. Articles I read about, yes.

Q. So you deny that you had heroin on November 7 when the officer took it out of your pocket?

Mr. Stern: Your Honor, I'm going to object now. We're right in the merits of the case.

The Court: You're right. We're beyond the scope of this hearing.

Mr. Romeo: Your Honor, I think this is as appropriate and proper—as I talked to the Court before, what

they want to do is they said to get a confidential informant's name, and they want it hopefully so the case will be dismissed in this (p. 38) particular instance. I think the Court always knows it's very easy to get out and say, no, I've never had heroin. I think we have a right in this instance to go into the fact that in fact he was arrested, he possessed heroin the next day. If he wants to deny it, fine. But I think that's appropriate in judging whether a confidential informant's name should be released when Mr. Nunez says I know nothing about heroin, I know nothing at all about it, the confidential informant is lying when he says the day before I was possessing it, working with it.

I think the Court can look at that circumstance and use that in its determination as to whether this is really a situation where the Defendant needs to have the confidential informant's name released or not. And I think in that regard, it's appropriate to go into it. It may not be used in other motions hearings for direct evidence. If he wants to admit, yes, I possessed the heroin but your search was illegal, we may not be able to use that as direct evidence in our case if he does admit that. But I think it's an appropriate area to go into.

Mr. Stern: Your Honor, I'm sorry I wasn't faster on my feet. I move to strike the statement of do you know what heroin is, to begin with. I think that goes to the heart of the case also. I was just not quick enough on my feet, and I move to strike that and renew my objection to this question. Your Honor, we're prepared, if the Court feels it's appropriate (p. 39)—we felt we needed to make a good-faith showing only. And the only purpose of this testimony is to show that on November 6, the date when allegedly this confidential informant saw these

things, that the only people who came to Mr. Nunez' house were these immediate relatives.

If the Court thinks it's appropriate, we would have no problem and would bring each and every one of them in front of the Court at the Court's convenience and District Attorney's convenience to say that they were the only individuals there and their family and none of them were confidential informants or anything else and none of them saw any of these things going on. I just thought we had to make a very simple showing which we're attempting to do, not to get into the facts of the case, Your Honor.

Mr. Romero: Your Honor, counsel's statements are not evidence. If he wanted to put them on, he should have had them here. His statements are not the equivalent of evidence. *Dailey* makes that very clear, and the Court cannot consider that for any purpose in saying, well, we would have brought them in. The Court cannot consider that.

The Court: Well, I'll sustain the objection made by Mr. Stern.

Mr. Romeo: All right.

Q. (By Mr. Romeo) You were there from 2 a.m. on all through November 6; is that correct?

(p. 40) A. All through November 6.

Q. Spent the whole day there?

A. Spent the whole day.

Q. And you were there the 7th; is that correct?

A. Pardon?

Q. You were there the 7th; is that correct?

A. The 7th I was there until I was picked up. My house was demolished, destroyed.

Q. Mr. Nunez, you have a civil suit filed against all the officers involved in this case; is that not correct?

Mr. Stern: Your Honor, I'd just like some statement of relevancy about the federal case that has been filed by Mr. Nunez.

The Court: I'll overrule it. I don't think it's particularly relevant, but I'll permit it.

Mr. Romeo: Thank you.

Q. (By Mr. Romeo) You filed a civil suit; is that correct, Mr. Nunez?

A. No, I haven't.

Q. Who's filed that?

A. My wife and my children.

Q. You've not filed that?

A. I have not.

Q. Why is that?

Mr. Stern: Your Honor, objection.

(p. 41) The Court: Well, there's no reason to go into that.

Q. (By Mr. Romeo) Mr. Nunez, isn't it a fact you've told various people that you intend to get the confidential informant in this case?

A. No, I haven't.

Q. Isn't it a fact you told people that in fact you'd gone to Mexico to buy heroin, in fact transported it yourself?

A. I cannot leave the state of Colorado.

Q. Mr. Nunez, the question was: Didn't you in fact tell people that though?

A. No, I haven't.

Mr. Romeo: I have nothing further, Your Honor.

Mr. Stern: Your Honor, I'd call Sergeant DeNovellis for two quick questions.

The Court: Thank you, Mr. Nunez.

(Witness excused.)

The Court: Sergeant DeNovellis, if you would be seated in the witness chair, please.
Whereupon,

DON DeNOVELLIS

was called as a witness on behalf of the defense and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stern:

Q. Sergeant DeNovellis, I want to ask you two quick (p. 42) questions about the third confidential informant we've been talking about without—I don't want you to divulge his name or identity. We've asked you these questions once before and you felt you were able to answer these questions without divulging the identity of the in-

formant. If you feel there's a question, please talk with the District Attorney before answering the question.

The observations allegedly made by that third confidential informant that formed the basis of your affidavit that Mr. Nunez was seen doing certain things within 24 hours of November 7, that confidential informant made those observations on November 6; isn't that correct?

A. That's correct.

Mr. Stern: I have no further questions.

The Court: All right.

Cross-Examination

By Mr. Romeo:

Q. Detective DeNovellis, the statement about Mr. Nunez going to Mexico which you describe in your affidavit, just briefly go over for the Court what in the affidavit the confidential informant told you.

A. Well, the confidential informant reported to me on November 7 that Mr. Nunez had told him that he had went to Mexico.

Q. Did the confidential informant ever say that he (p. 43)personally knew that Mr. Nunez had gone to Mexico?

A. No. Just what Mr. Nunez had told him.

Q. And is that what you put in the affidavit?

A. Yes, sir.

Q. Did the information given to you by the third confidential informant coincide with the information you

received from a citizen informant and the second confidential informant?

A. Yes, it did.

Q. Sergeant DeNovellis, are you aware of any deaths that have occurred at the Nunez household?

Mr. Stern: Your Honor, I'm going to object. I don't know what the relevance of that is, but——

The Court: I'll permit it to proceed. I assume that relevance will be tied up.

Mr. Romeo: I'll tie it up very shortly.

Q. (By Mr. Romeo) Are you aware of any deaths that have occurred at Mr. Antonio Nunez' house?

A. Yes, sir.

Q. Have you any information that they are drug-related?

A. Yes, sir.

Q. Would you please explain that to the Court as to when these occurred and what the relationship to drugs is.

A. That Mr. Pat Torres has died of an overdose of morphine or heroin in the residence of Mr. Antonio Nunez.

Q. And approximately when was that?

(p. 44) A. The exact time and date I don't recall. It was after the execution of the search warrant.

Mr. Romeo: I have nothing further of Sergeant DeNovellis at this time, Your Honor.

Mr. Stern: Just two questions, Your Honor.

The Court: All right. Thank you.

Redirect Examination

By Mr. Stern:

Q. Isn't it true that the person who died was Pat Torres? Is that correct?

A. That's correct.

Q. And the death occurred some six, eight, ten months after the execution of the search warrant; isn't that true?

A. Was it that long? I don't recall the date, sir. I'm sorry. I don't recall what date.

Q. Wasn't it approximately six months after the execution of the search warrant?

A. I don't really know. I testified I don't know what the date was.

Q. But it was more than just a week or two?

A. Yes.

Q. It was a substantial period of time?

A. I'm sorry—

Q. And that was the same Pat Torres the Affiant No. 2 said who was selling heroin?

(p. 45) A. That's correct.

Q. And prior to the time that you prepared this affidavit and prior to the execution of the search warrant which both occurred on the same day, you had no idea of any relative relationship between this Pat Torres and Mr. Nunez; isn't that correct?

A. Well, prior to—

Q. Prior to the execution of the search warrant.

A. Oh, yes. We knew that Pat—a party named Pat had been staying at the residence.

Q. But my question is: You had no idea that that person was the brother-in-law of Mr. Torres prior to the preparation of your affidavit; isn't that correct?

A. I think we learned on the 4th or 5th that it was Pat Torres that they were talking about. But the relationship, no, I didn't know.

Q. The relationship between them, the blood relationship or in-law relationship, you didn't know until long after the affidavit or until after you prepared the affidavit?

A. That's correct.

Mr. Stern: No further questions.

Recross-Examination

By Mr. Romeo:

Q. It was described in the affidavit, was it not, Sergeant DeNovellis, that Pat was selling Mr. Nunez' heroin? Is that (p. 46) correct?

A. That's correct.

Q. And that Pat was driving Mr. Nunez' vehicle; is that correct?

A. Driving the car that listed to Mr. Nunez, yes.

Q. And you checked that out, whether in fact it did list to Mr. Nunez?

A. That's correct.

Q. And in fact it did; is that correct?

Mr. Stern: Your Honor, I'm going to object. The District Attorney is now going outside the four corners of the affidavit. If that's proper, then I'll—

Mr. Romeo: It's described right in the affidavit, Your Honor. I think you can read it right in there.

The Court: Yes. I'll overrule the objection.

Q. (By Mr. Romeo) And you checked that out; is that a fact?

A. Yes.

Q. And in fact it did list Mr. Nunez at the Norwich Street address?

A. Yes.

Q. And that Pat was going to be selling Mr. Nunez' heroin until Mr. Nunez returned to town?

A. That's correct.

Mr. Romeo: I have nothing further at this time.

(p. 47) Mr. Stern: May I ask just a few more questions, Your Honor?

The Court: Okay. We're not going to do this all afternoon, folks. Go ahead.

Further Redirect Examination

By Mr. Stern:

Q. There's nothing in the affidavit that establishes it was Mr. Nunez' heroin? All there was in the affidavit is the statement that was just read to you?

A. That's correct.

Q. And there's no statement in the affidavit that Mr. Nunez was selling or actually possessing any heroin other than the statement it was Mr. Nunez's heroin without any further description?

A. Well, the informant had said that a party named Pat was holding and selling Mr. Nunez' heroin while he was out of town. That's the basis of that.

Q. But there's nothing in that statement that Mr. Nunez had any heroin in his possession or was selling any heroin on November 3 when the confidential informant made his observations?

A. I'm trying to answer you as honestly as I can, but I'm kind of lost. The informant said that Mr. Nunez was actively engaged in heroin out of his residence on Norwich Street but that Mr. Nunez was gone out of town and while he was out of town, a party named Pat living on 33rd and Irving had Mr. Nunez' heroin (p. 48) and was distributing it there.

Q. But there's nothing in that affidavit wherein Informant No. 2 we're talking about now says he saw Mr. Nunez possessing this heroin or selling this heroin?

A. No.

Mr. Stern: No further questions.

The Court: Thank you, Detective DeNovellis.

(Witness excused.)

Mr. Stern: Your Honor, we'd call Shawn Nunez. If I might go get him.

The Court: Shawn, come forward and be seated in the witness chair to my right, please. Raise your right hand, please. You do solemnly swear under penalty of perjury the testimony you give the Court would be the truth, the whole truth, and nothing but the truth?

Shawn Nunez: I don't understand that. You said it too fast.

Whereupon,

SHAWN NUNEZ

was called as a witness on behalf of the defense and, having been first duly sworn, was examined and testified as follows:

The Court: How old are you, Shawn?

The Witness: 12.

The Court: Do you understand that oath that I just gave you?

(p. 49) The Witness: (Witness nods head.)

The Court: What does it mean?

The Witness: It means not to lie.

The Court: What happens if you do lie?

The Witness: You'll be punished.

The Court: How?

The Witness: (Witness shrugs.)

The Court: Do you know?

The Witness: (Witness shakes head.)

Mr. Stern: Your Honor, as an offer of proof, this witness will just corroborate the same testimony as Mr. Nunez about the dates of—

Mr. Romeo: I'm going to object about going into offers of proof. That's why we have sequestration.

Mr. Stern: I'm sorry, Your Honor.

The Court: All right. What grade in school are you in, Shawn?

The Witness: Seventh.

The Court: Where do you go to school? Shaw Heights?

The Witness: Yes, I do.

The Court: If you don't tell me the truth today, do you know that I have the authority to punish you for that if I find out about it?

The Witness: Punish me?

The Court: If you don't tell me the truth today, do (p. 50) you know that I have the authority to punish you for lying to me?

The Witness: I don't know what "authority" means.

The Court: Do you know that I can punish you for lying to me, I can lock you up in jail for a long time?

The Witness: I didn't know that.

The Court: I'm not sure that Shawn understands the oath.

Mr. Stern: I'll withdraw the witness.

The Court: Pardon me?

Mr. Stern: I'll withdraw the witness at this point.

The Court: Thank you, Shawn. You may step down. Thank you for your statements.

(Witness excused.)

Mr. Stern: Your Honor, at this point in time we have no further witnesses. If my understanding of what our burden of proof is at this point in time is correct, I would request a continuance to bring in the other individuals that were there on the 6th, all of whom will testify as I indicated.

The Court: We were proceeding on the basis there wouldn't be a continuance in this matter, and that's the basis in which we're going to proceed.

Mr. Stern: Fine. I have no further witnesses.

The Court: Any witnesses, Mr. Romeo?

Mr. Romeo: I'd call Jeff Reutz.

(p. 51) The Court: Do you have any objection to Shawn Nunez being in court?

Mr. Romeo: Not at this time, Your Honor, since he's not going to be testifying. And I assume he's not going to be testifying at trial.

The Court: I'm not going to permit him to if he—

Mr. Romeo: All right.

The Court: Would you please come forward, sir, and be seated in the witness chair to my right.

Mr. Stern: Your Honor, I have no idea whether he will testify at trial or not. He certainly won't testify today, so I'll have him go sit outside.

The Court: All right. Raise your right hand, please. Whereupon,

JEFFREY E. REUTZ

was called as a witness on behalf of the People and, having been first dudly sworn, was examined and testified as follows:

Direct Examination

By Mr. Romeo:

Q. Please state your name, spelling your last name for the record.

A. Jeffrey E. Reutz, R-e-u-t-z.

Q. What's your occupation, sir?

A. I'm a detective with the Major Peddler Unit of the Denver Police Department.

(p. 52) Q. What is the Major Peddler Unit?

A. It's a unit within the Narcotics Bureau which is essentially geared to target persons that are felt to be major narcotics dealers and to do conspiracy and long-term investigations.

Q. Are you familiar with an Antonio Nunez?

A. Yes, sir, I am.

Q. Do you see him in the courtroom today?

A. Yes, sir, I do.

Q. Could you point him out by where he is.

A. Mr. Nunez is seated at the defense counsel table to the immediate left of Mr. Stern.

Mr. Romeo: Your Honor, I ask the record reflect the witness has identified the Defendant.

The Court: Surely.

Q. (By Mr. Romeo) On November 7, 1981, did you have an occasion to obtain narcotics from Mr. Nunez?

A. Yes, sir, I did.

Q. Where did you obtain those from him? How did you obtain those from him? Just briefly from where?

A. It was inside his residence, and it was on Mr. Nunez' person in the right pocket of a pair of sweat pants that he was wearing.

Q. And could you describe what you took from him from that right pocket.

A. Yes, sir. There was an amount of cash in that pocket (p. 53) along with what appeared to me to be a bread wrapper. And within that bread wrapper were 15 rolled and tied balloons which ultimately proved to contain heroin.

Q. The packaging that you saw in his pocket—how long have you been a narcotics officer?

A. I've been involved in narcotics investigations for about four years.

Q. The packaging that you saw in Mr. Nunez' pocket on that date, what did that tell you about that person?

A. In my experience, I found that particular mode of packaging—in other words, the rolled and tied balloon—is consistent with the way people involved in the trafficking of heroin package heroin to be sold either to street dealers or to users.

Q. Why, for the Court's information, is it rolled and tied in balloons?

A. Well, there's a number of reasons, one of which is that the standard amount sold at that level is something near a gram or less and that fits conveniently in the bottom of the balloon and can be tied and rolled. And I think probably the primary reason is that the balloon material is nondigestible. And I've seen in many instances a person will retain the balloon with the heroin in his mouth or swallow the balloon in the effort to secret the heroin. And it can, therefore—since the balloon is nondigestible, it can therefore be recovered at a later time.

Q. Is that 15 balloons that you found inconsistent with (p. 54) personal use?

Mr. Stern: Your Honor, I would object to the question without more of a foundation.

The Court: Oh, I'll overrule the objection.

Q. (By Mr. Romeo) In your experience, Officer?

A. Yes. In my experience that would be inconsistent with personal use.

Mr. Romeo: I have nothing further of this witness, Your Honor, at this time.

Mr. Stern: I have no questions.

Mr. Romeo: For the veracity hearing.

The Court: Officer, from the 15 balloons that you seized, you have expected to have yielded about 15 grams of—

The Witness: Well, at one time an individual balloon or bag, as it is commonly referred to, on the street used to contain a gram of heroin. In recent years we've seen that quantity diminish somewhat. And it now runs I would say, just roughly as an average, between .6 and .8 grams.

The Court: Okay. Does counsel have any questions based on the questions I asked?

Mr. Romeo: Just one.

Q. (By Mr. Romeo) Do you remember approximately how much this did end up weighing out to be?

A. No, sir, I don't. I have seen the lab analysis report, but I don't recall the specific number.

(p. 55) Q. If I showed you that, would that refresh your memory possibly?

A. Yes, I believe it would.

Q. If you'l just tell the Court what you're examining right now.

A. What I have in front of me is the evidence examination report which was received from the Denver Police forensic laboratory. And it has the report of the chemical analysis and examination done on the 15 balloons when we submitted it to the lab. The results of the test which was performed by Detective Mark Owen, who's one of the chemists in the lab, was that he found the powder which was contained in each one of the balloons to be heroin, and he found a total net of 9.6 grams.

Q. Does that change your opinion, the 9.6 grams, in any way as this being for personal use or for sale?

A. No, sir, not at all.

Q. And thus your opinion with the 9.6 grams packaged in this fashion would be—what?—was this for sale or for personal use?

A. My opinion is that it would be for sale.

Mr. Romeo: Nothing further, Your Honor.

The Court: Thank you, Mr. Romeo.

Thank you, Officer.

(Witness excused.)

Mr. Romeo: I have no further witnesses at this time, (p. 56) Your Honor.

The Court: All right.

Mr. Stern: I have nothing further on this issue, Your Honor.

The Court: All right. I'm prepared to rule upon the Motion for Disclosure of Confidential Witnesses without further argument. If counsel wishes to make argument, they're welcome to do so.

Mr. Stern: Your Honor, we move for disclosure on two bases, one for the purpose of the Motion to Suppress and the other for the purpose for use at trial which are two separate matters. We believe that this witness would be able to give relevant evidence as to whether or not Mr. Nunez did possess heroin and, if it's within the confines within that same decision, the *Bueno-Archuletta* decision, on the use of a confidential informant at trial. I don't know if the Court wants further argument on that. I'd just point that out to the Court.

The Court: Thank you, Mr. Stern.

Mr. Romeo: Your Honor, I'll try to be brief. I don't want to prolong this thing any longer than necessary, but I do find this to be a particularly important decision. I think the Court realizes people are kept confidential for many reasons. Your Honor, in this particular situation, we have a situation where they're not saying that the officer lied or that he had a reckless disregard for the truth. They're saying that the (p. 57) informant may have related information which was untrue.

I think under *Dailey,* what *Dailey* says on page 61 of the Brief Times Reporter previously cited, "If the source of the error is intentional falsehood or reckless disregard for the truth on the part of the officer-affiant, the statements must be stricken from the affidavit . . . if, on the other hand, the error has some other source we leave to the trial court the initial resolution of the consequences . . ." citing the other cases in this particular instance. The burden of proof, " . . . the defendant can show by a preponderance of the evidence that the error in the affidavit for search warrant was caused by an officer-affiant's perjury or reckless disregard for the truth."

And in this particular instance, there's no allegation of that. There's no evidence to that. In fact all the evidence shows Mr. Nunez was home the whole day. Thus, there's no dispute that in fact the confidential informant could have seen exactly what he saw.

The argument by defense counsel implied that, well, the relatives were there. They may be the confidential in-

formant, one of those people. We're not going to say who the confidential informant is.

Mr. Nunez has a prior felony conviction, I suspect more than one prior felony conviction, although it may only be one. There are lawsuits, civil lawsuits, pending. Mr. Nunez (p. 58) has an intimidation of witness case pending against him. In looking at a balancing test in this regard, I submit the balance does not go to the Defendant in this particular instance.

As to the trial on the merits, the confidential informant is not a witness. This is a warrant case, and items were seized at the residence. That's the basis for the prosecution. Unless we were to endorse the confidential informant as a witness and put them on as to the trial, they're definitely not entitled to that. I submit in this particular instance, they're definitely not entitled to the disclosure of the confidential informant here.

The Court can see by looking at the affidavit, the second confidential informant, the one they're not even contesting, states—and it's stated in the warrant that Antonio "Pic" Nunez, the confidential informant stated, was actively engaged in the sale of heroin, that this "Pat" was dealing Mr. Nunez' heroin, in fact that was confirmed, and confirmed by the Defendant, yes, he was out of town, he was using Mr. Nunez' vehicle, confirmed by the officer as stated in the affidavit. These things were confirmed which support what the third confidential informant says, the arrest of Mr. Nunez, the finding within 24 hours of what the confidential innformant says was the cutting and processing of heroin, finding in fact heroin on him packaged for sale.

Your Honor, I submit that they have not made their (p. 59) burden in this case, a burden which is even stronger since alls they can allege is that possibly the confidential informant may not have related things truthfully. The two things they say he did not relate truthfully is, one, is Mr. Nunez states he never told anyone he went to Mexico to get heroin. The confidential informant, if his name was released, says, yes, he did tell me that. Your Honor, even if you strike that from the affidavit, probable cause does not fall.

Secondly, that the confidential informant saw him processing some heroin the day before. Here we have the evidence. He's arrested within 24 hours. He's in fact caught with heroin. I submit that rebuts the Defendant's evidence that he knows nothing about heroin, has nothing to do with heroin, no one had nothing to do with heroin on the 6th.

Your Honor, I submit they've not met their burden. Even if they have, when the Court applies the balancing test, this confidential informant's name should not be released.

The Court: That's all. The Court's heard the testimony of the various witnesses who have testified in this matter. The Court has reviewed the cases the Court believes to be applicable to this situation, *People v. Dailey* and *People v. Bueno*.

In reviewing the affidavit for the search warrant which was issued by Judge Carelli, the Court finds that the probable cause to issue that search warrant must have been established by the information contained in the

third or fourth paragraph (p. 60) on the search warrant as it relates to the third informant, the third confidential informant. The Court is not at all sure that probable cause can be shown simply by the first two confidential informants in this situation. The Court finds that the confidential informants go to the Motion to Suppress.

The Court has a great deal of trouble with revealing the evidence, revealing the identity of the confidential informants, because the Court understands what happens to confidential informants whose identity is revealed. They are quite frequently the subject of, at the very least, harassment. However, the Supreme Court of the United States inn the case of *Roviaro v. United States* states very clearly, "'Where the disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.'"

I don't think the Court has any choice. I'll find that the Defendant has made a showing that the identity of the confidential informant is required to fairly meet the determination of the motion to suppress evidence; further, that it's probably just as necessary for the trial of this case, the identity of that particular informant.

It doesn't give the Court a great deal of pleasure (p. 61) to make that ruling. It would seem to the Court, just as a comment on this case in general, for the government to take the position that rather than disclose the confidential informant they'll submit to a dismissal of this case, in a case of this magnitude it certainly

seems to the Court to be wrong. Everybody in this world is at risk at one time or another. People in the drug trade are as much at risk as other people. I hate to see the effort to prevent the sale of this type of material hampered because we're going to protect the identity of some confidential informants. But it's the choice that the People have to make in this case. I'll order the disclosure of the identity of the confidential informant.

Mr. Romeo: Would the Court give us 10 days to make a final determination as to whether or not—

The Court: Absolutely.

Mr. Romeo: And for possible interlocutory appeal procedures to follow after that?

The Court: Absolutely. Let's do this. The matter is set for trial when, Mr. Romeo? I'm sorry. I didn't check it.

Mr. Stern: I believe, Your Honor, October 28.

The Court: October 28?

Mr. Stern: If I can double-check.

The Court: If the People are going to disclose the confidential informant to the defense, that has to be done on (p. 62) on or before September 24, 1982. If it's done then, that will also serve as a setting date for the Motion to Suppress, 8:30 a.m.

Mr. Stern: On the 24th, Your Honor?

The Court: On September 24.

Mr. Romeo: Your Honor, does the Court wish to make any further findings of fact as to how the dis-

closure of the informant is relevant as to the trial on the merits versus the Motion to Suppress at this time in that he's not an eye or ear witness to the charge?

The Court: It seemed to the Court it was not a perceiving witness.

Mr. Romeo: No, it's not. The charge of possession of heroin on the 7th day of November, 1981, the only time the informant sees Mr. Nunez with heroin is on the previous day, the 6th, and that information is related to the officer. And this is a prosecution which continues only, as many other cases have—in fact I think it's *Bueno* in fact itself—

The Court: The only concern with Mr. Nunez' possession of the heroin is on November the 7th; is that correct?

Mr. Romeo: Yes. When Officer Reutz says, he testified, took the heroin from him out of his pants pocket.

Mr. Stern: Your Honor, if I could make a statement why we felt it was relevant in trial, if the Court would like to hear that at this time.

The Court: Sure.

(p. 63) Mr. Stern: We felt it was relevant if we could show this information was somehow fabricated, that it would tend to show that perhaps Mr. Nunez was not in possession of heroin on that date since it will be solely a credibility contest between Mr. Nunez and the officer whether he did or did not possess it at that time. That's on the issue of the trial.

The Court: If that's correct, the Court misunderstood the thrust of the information in the affidavit, and

the Court will not order the disclosure of the confidential informant on the basis that he would be a necessary witness at the—necessary for the trial of the matter, simply the suppression motion.

Mr. Romeo: Your Honor, I assume also by the Court's ruling, it's initially also stating that the Court is denying our motion from the initial start—to deny our motion not to even hear the veracity hearing because of failure to comply with the rules.

The Court: That's correct. It was my understanding —and this is what I was trying to get at at the very beginning. Oh, yes, all right. Oh, I see what you're saying. Yes.

Mr. Romeo: Although once the Court ruled that way, we didn't waive our objection by going ahead today to that initial objection.

The Court: Sure.

Mr. Romeo: Thank you, Your Honor.

The Court: Anything further?

(p. 64) Mr. Romeo: Nothing further at this time.

The Court: Court will be in recess.

(Whereupon, the proceedings were concluded at the hour of 4:34 p.m.)

(p. 65) JUDGE'S CERTIFICATE

I, PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado, who presided at the hearing of this cause, hereby certify the foregoing to be all the portions of the record

designated or agreed upon by the parties and not certified by the Clerk.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Philip F. Roan
PHILIP F. ROAN, Chief Judge

APPROVED:

PAUL Q. BEACOM, DISTRICT ATTORNEY
COUNTY OF ADAMS, STATE OF COLORADO
BY: /s/
DEPUTY DISTRICT ATTORNEY

BY: /s/
DEFENSE COUNSEL

(p. 66) REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity of Official Reporter of Division E, District Court, Adams County, Colorado, at the times and places above set forth.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Leslie Maes
LESLIE MAES, Official Reporter,
Certified as a Qualified Court
Reporter in the State of Colorado

DISTRICT COURT, ADAMS COUNTY, COLORADO

Criminal Action No. 82CR0025, Division E

REPORTER'S TRANSCRIPT

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant.

The hearing in this matter commenced on Friday, September 24, 1982, before the HONORABLE PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado.

FOR THE PLAINTIFF:

OFFICE OF PAUL Q. BEACOM
DISTRICT ATTORNEY, ADAMS COUNTY, COLORADO
450 South Fourth Avenue
Brighton, Colorado 80601

By: JEFFREY L. ROMEO, Registry No. 8454
Deputy District Attorney

FOR THE DEFENDANT:

KENNETH H. STERN, Registry No. 9198
1763 Franklin Street
Denver, Colorado 80219

(p. 2) (Whereupon, the following proceedings were had at the hour of 8:36 a.m., and the Defendant was not present.

The Court: People of the State of Colorado versus Antonio G. Nunez, 82CR0025.

Mr. Stern: Good morning, Your Honor. Kenneth H. Stern appearing on behalf of the Defendant.

The Court: Thank you, Mr. Stern.

Mr. Stern: As I indicated to the Court earlier this week, the Defendant is on trial in Denver, Colorado, Judge Plank's division, Courtroom 11. I understand the procedure we'll follow is a warrant will issue but it will be stayed so he can be here next week.

The Court: That's fine. Any problem, Mr. Romeo?

Mr. Romeo: No. I have no objection to the warrant being issued and stayed until a reasonable period of time when he can get in here.

The Court: Can you give me an idea when that will be?

Mr. Stern: We'd ask for one week, Your Honor.

The Court: We'll issue the bench warrant for the arrest of Mr. Nunez, stay the execution of that bench warrant until October 4, 1982, at 8:30 a.m.

Mr. Stern: Your Honor, in my discussions with Mr. Romeo—perhaps he can state his position. It's my understanding that they are not going to disclose the informant in which (p. 3) case I would have a number of motions to make if that in fact is the case.

Mr. Romeo: Your Honor, in this particular case it's my understanding, of course, it was the Court's ruling last time we were here we are required to disclose the informant. The Court felt under *Dailey* and some of the other cases that once the Defendant took the stand and contradicted the CI in any fashion where in this case—the only question was the CI's veracity—that the Court felt it had no discretion but to order the release of that informant. We, of course, felt otherwise. The Court

used the balancing test, and the Court felt in this situation once the Defendant takes the stand, the Court has no discretion.

In this case, Your Honor, we are not going to disclose the informant. As we had previously informed the Court, we have grave concern about the safety of the informant in this case. Mr. Nunez is pending a harassment of witness case plus an information in this case. Mr. Nunez stated to people he would get the confidential informant in this case. That being the information, the People would not be disclosing the confidential informant at this time.

Mr. Stern: Your Honor, at this time we would therefore move to dismiss or, in the alternative, that our Motion to Suppress be granted.

The Court: Well, we'll hear the motions if you file (p. 4) them in writing at an appropriate time.

Mr. Stern: We have filed our Motion to Suppress, Your Honor.

The Court: I understand. I'm not going to rule on it today.

Mr. Romeo: I take it my understanding of the Court's ruling is correct in what I stated previously.

The Court: To be honest with you, Mr. Romeo, I don't remember. I don't think that I said I didn't have any discretion once that had occurred. But, as I say, I don't recall. The record will reflect what my ruling was and what it was based on.

Mr. Romeo: All right.

Mr. Stern: Your Honor, I was wondering how we would be proceeding from this point. We did have a Motion to Suppress filed and pending. I believe you ordered that the informant be disclosed for the purpose of that Motion to Suppress. Now that the informant is not going to be disclosed—

The Court: We'll take it up on October 4.

Mr. Stern: That's fine.

Mr. Romeo: Your Honor, I'm wondering if in this case it might be well for the Court, considering the complexity of this issue and relative newness in the law, whether the Court might want to make written findings of fact.

The Court: I think I'll do that.

(p. 5) Mr. Stern: Your Honor, I don't know what position the Court takes. But I have prepared for the Court's information only a proposed findings of fact and conclusions of law the Court might want to review.

The Court: That's fine.

Mr. Stern: I am tendering a copy to the District Attorney. If I might approach the Bench.

The Court: Certainly. Thank you.

Mr. Stern: Thank you. Your Honor, just for one point of clarification, the Motion to Suppress will be continued until October 4?

The Court: Yes. Anything further on the Nunez matter?

Mr. Romeo: No, Your Honor.

Mr. Stern: Nothing at this time, Your Honor, on behalf of the Defendant.

Mr. Romeo: I've just received this, and I haven't had a chance to review it so—

The Court: Well, it doesn't make much difference. It's a proposal.

Mr. Romeo: All right. Thank you.

(Whereupon, the proceedings were concluded at the hour of 8:42 a.m.)

(p. 6) JUDGE'S CERTIFICATE

I, PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado, who presided at the hearing of this cause, hereby certify the foregoing to be all the portions of the record designated or agreed upon by the parties and not certified by the Clerk.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Philip F. Roan
PHILIP F. ROAN, Chief Judge

APPROVED:

PAUL Q. BEACOM, DISTRICT ATTORNEY
COUNTY OF ADAMS, STATE OF COLORADO

BY: /s/
DEPUTY DISTRICT ATTORNEY

BY: /s/
DEFENSE COUNSEL

(p. 7) REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capac-

ity of Official Reporter of Division E, District Court, Adams County, Colorado, at the times and places above set forth.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Leslie Maes
LESLIE MAES, Official Reporter,
Certified as a Qualified Court
Reporter in the State of Colorado

DISTRICT COURT, ADAMS COUNTY, COLORADO

Criminal Action No. 82CR0025, Division E

REPORTER'S TRANSCRIPT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

ANTONIO GUADALUPE NUNEZ,

Defendant.

The hearing in this matter commenced on Monday, October 4, 1982, before the HONORABLE PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado.

FOR THE PLAINTIFF:

OFFICE OF PAUL Q. BEACOM
DISTRICT ATTORNEY, ADAMS COUNTY, COLORADO
450 South Fourth Avenue
Brighton, Colorado 80601

By: JEFFREY L. ROMEO, Registry No. 8454
Deputy District Attorney

FOR THE DEFENDANT:

KENNETH H. STERN, Registry No. 9198
1763 Franklin Street
Denver, Colorado 80219

(p. 2) (Whereupon, the following proceedings were had at the hour of 9:44 a.m.)

Mr. Stern: Good morning, Your Honor. Kenneth H. Stern appearing on behalf of Mr. Nunez who is present in court this morning.

The Court: Thank you, Mr. Stern.

Mr. Stern: Good morning, Your Honor.

The Court: Good morning, Mr. Romeo.

Mr. Romeo: This, Your Honor, came on merely for the return of the Defendant on his bench warrant that was issued and stayed until this morning from 9-24, our previous hearing date.

Mr. Stern: Also, Your Honor, I believe that the Court was going to rule at this time on the Defendant's Motion to Dismiss or, in the alternative, a Motion to Suppress which was made orally on the 24th and was set over to this date, and the Court requested us to file a motion which I have filed, a copy of which was sent to the District Attorney's Office.

Mr. Romeo: Your Honor, I haven't received that motion. Mr. Stern has just handed me a copy this date. It was mailed on the 27th.

Mr. Stern: Your Honor, if you will recall, at the last court hearing the District Attorney announced they were not going to disclose the informant pursuant to the

Court's order. I at that time moved to have the case dismissed or, in (p. 3) the alternative, to have the Motion to Suppress granted. You requested I file a written motion to that effect.

The Court: All right.

Mr. Romeo: Your Honor, also the last time we were here I had suggested to the Court and the Court had indicated that it would probably do so, to make some findings of fact and law in this regard because I had attempted to outline my understanding of what the Court's ruling was basically at our previous hearing on the Motion to Disclose the Confidential Informant and the Court wasn't sure my interpretation was correct. And I think really we had a somewhat confused hearing at that time, and that's why I requested and I think that's why the Court suggested it would make findings of fact.

Mr. Stern: I did at that time, Your Honor, submit proposed findings for the Court's review.

The Court: The Court has reviewed the findings that were prepared by Mr. Stern. The Court wants to make its own findings of fact and enter its own order. The Court will do that by Friday of this week.

Mr. Stern: Your Honor, just for my information, there was another aspect to my Motion to Suppress other than this aspect. This might I would presume resolve that. However, there was another contention in the Motion to Suppress, and also we have a trial date I think set for October 27. Would your ruling that would come out on Friday state the Court's position about (p. 4) whether—in other words, what I'm wondering is whether

the jury is going to be vacated for that date or whether we—

The Court: Well, I think that will be taken care of in the order.

Mr. Stern: Thank you.

The Court: Mr. Romeo?

Mr. Romeo: That's fine, Your Honor. Obviously, the other parts of any Motion to Suppress can't be addressed by the Court because they haven't been heard I assume.

Mr. Stern: I wasn't asking the Court to enter ruling. I was depending on what occurs with this motion. I was just making it known to the Court and the District Attorney that there was another aspect that would be heard should the Court rule in a certain way or would not be necessary should the Court rule in another way.

The Court: All right. The Court will find Mr. Nunez is present before the Court at this time. We'll vacate that bench warrant. The trial date will be the bond return date for Mr. Nunez at this time. The Court will issue an order Friday of this week.

Mr. Stern: Thank you, Your Honor.

Mr. Romeo: Thank you.

The Court: Yes. Thank you.

(Whereupon, the proceedings were concluded at the hour of 9:49 a.m.)

(p. 5) JUDGE'S CERTIFICATE

I, PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado, who presided at the hearing of this cause, hereby certify the foregoing to be all the portions of the record designated or agreed upon by the parties and not certified by the Clerk.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Philip F. Roan
PHILIP F. ROAN, Chief Judge

APPROVED:

PAUL Q. BEACOM, DISTRICT ATTORNEY
COUNTY OF ADAMS, STATE OF COLORADO

BY: /s/
DEPUTY DISTRICT ATTORNEY

BY: /s/
DEFENSE COUNSEL

(p. 6) REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity of Official Reporter of Division E, District Court, Adams County, Colorado, at the times and places above set forth.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Leslie Maes
LESLIE MAES, Official Reporter,
Certified as a Qualified Court
Reporter in the State of Colorado

IN THE DISTRICT COURT, ADAMS COUNTY,
STATE OF COLORADO

Criminal Action No. 82CR0025

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

ANTONIO NUNEZ,

Defendant.

The Defendant's MOTION FOR DISCLOSURE OF INFORMANT having come before the Court on September 9, 1982, and the Court having heard testimony and the arguments of counsel and being fully advised in the premises, does make the following Findings of Fact, Conclusions of Law and Order:

1. On November 7, 1981, a member or members of the Denver Police Department prepared an affidavit for search warrant and based upon said affivadit, obtained a search warrant for 8690 Norwich Street, Adams County, Colorado, and two named vehicles.

2. During the execution of said search warrant, approximately fifteen balloons of heroin were recovered.

3. The affidavit, upon which issuance of the search warrant was predicated, related information from a previously reliable confidential informant that the informant was at the location of 8690 Norwich within the twenty-four hour period from November 6, 1981, to November 7, 1981 and observed Antonio "Pic" Nunez in possession of a large amount of heroin, that Nunez was cutting the

heroin, that Nunez was putting the heroin in balloon packages, that Nunez told the informant that he had just returned from Mexico where he had purchased five ounces of heroin which he brought into the United States.

4. The Defendant filed a motion seeking disclosure of the identity of the informant described in Paragraph 3. above.

5. The Motion For Disclosure is two pronged alleging a need for the purpose of challenging the legality of the search and a need for defending against the substantive charge.

6. At the hearing, the Defendant testified that he had been on a hunting trip for the week proceeding the date of the affidavit and search, having arrived home on November 6, 1981. He also testified he had driven the motor home described in the affidavit on the hunting trip. The Defendant further testified that from the time he returned home to the time the search warrant was executed, only immediate family members had been present in his home and that he had not engaged in the activities described by the confidential informant.

7. The Court finds that as to the legality of the search issue, the Defendant has made the required initial showing pursuant to *People v. Bueno,* Vol. VI, Brief Times Report, p. 522 (June, 1982).

8. The Court finds that as to the issue of disclosure on the basis of the informant's being an essential witness on the issue of guilt or innocence, the Defendant has made a showing of a reasonable basis in fact to believe the informant is a likely source of relevant and helpful evidence to the accused.

9. The Court, therefore, orders the District Attorney to disclose the identity of the confidential informant to the Defendant and failing that, the Court orders suppression of the evidence seized pursuant to the search warrant.

Done and signed in Open Court this 7th day of October, 1982.

BY THE COURT:
/s/ Philip F. Roan
Philip F. Roan
Chief Judge

copies to counsel
10/7/82

IN THE
DISTRICT COURT, ADAMS COUNTY, COLORADO
Criminal Action No. 82CR0025, Division E

ORDER

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

ANTONIO NUNEZ,

Defendant.

THE COURT being advised by the District Attorney that the identity of the confidential informant will not be disclosed to the Defendant, the evidence which is the subject of the Defendant's Motion to Suppress is, therefore, suppressed.

Done and signed in Open Court this 12th day of October, 1982.

BY THE COURT:
/s/ Philip F. Roan
Philip F. Roan
Chief Judge

copies to counsel
10/12/82

DISTRICT COURT, ADAMS COUNTY, COLORADO

Criminal Action No. 82CR0025, Div. E

NOTICE OF INTERLOCUTORY APPEAL

(Filed October 18, 1982)

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,

Defendant-Appellee.

The plaintiff, by counsel, pursuant to C.A.R. 4.1 appeals the decision of the District Court to suppress evidence in this case. As grounds for this motion, the plaintiff alleges:

1. The defendant was charged with Possession of a Schedule I Controlled Substance, contrary to C.R.S. 1973, § 12-22-309 and § 18-18-105 (2) (a), as amended.

2. On November 7, 1981, officers of the Denver Police Department and the Adams County Sheriff's Office searched the defendant's residence pursuant to a warrant. During this search, those officers searched the defendant and discovered heroin.

3. Pursuant to C.R.Cr.P. 41, the defendant requested that the prosecution disclose the confidential informant's identity. The defendant also moved to suppress the evidence seized during the search, alleging that the warrant upon which the police officers relied to gain entry into the defendant's house was not based upon probable cause.

4. The trial court heard the prosecution's testimony concerning these motions on September 24, 1982, and October 4, 1982.

5. On October 7, 1982, the trial court issued Findings of Fact and Conclusions of Law. That court held that the prosecution must disclose the identity of the informant. If the prosecution did not make that disclosure, the trial court stated that it would suppress the evidence seized pursuant to the search warrant.

6. After being advised by the prosecution that it would not disclose the informant's identity, the trial court suppressed the evidence seized pursuant to the search warrant on October 12, 1982.

7. That ruling was error.

8. The evidence that the court suppressed is a substantial part of the prosecutions' proof against the defendant.

9. This appeal is not taken for purposes of delay.

WHEREFORE, the plaintiff respectfully appeals from the decision of the District Court to suppress the evidence in this case.

Respectfully submitted,

PAUL Q. BEACOM, District Attorney
Seventeenth Judicial District

By: /s/ Steven L. Bernard
Steven L. Bernard, No. 8897
Chief Trial Deputy
450 South Fourth Avenue
Brighton, CO 80601 (303) 659-7720

CERTIFICATE OF SERVICE

I certify that on the ____ day of _____, 1982, a true copy of the Notice of Interlocutory Appeal was deposited in the U.S. Mail at Adams County, Colorado, postage prepaid, in a securely sealed envelope, addressed to:

Kenneth H. Stern, Esq.
1760 Lafayette Street
Denver, CO 80218

SUPREME COURT, STATE OF COLORADO

Criminal Action No. 82SA512, Division E

OPENING BRIEF

(Filed November 29, 1982)

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee.

Interlocutory Appeal to the District Court,
Adams County, Colorado

Case No. 82CR0025

The Honorable Philip F. Roan, Judge

PAUL Q. BEACOM
District Attorney

STEVEN L. BERNARD
Chief Trial Deputy
Seventeenth Judicial District
450 South Fourth Avenue
Brighton, Colorado 80601
659-7720

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(p. 1) SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

OPENING BRIEF

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee.

STATEMENT OF FACTS

On November 7, 1981, pursuant to a warrant, Denver police officers and Adams County Sheriff's deputies searched the house located at 8690 Norwich Street, unincorporated Adams County, Colorado. During this search, these officers searched the person of the defendant, Antonio Nunez. The officers discovered fifteen balloons in Mr. Nunez's pockets, which contained a substance later analyzed to be heroin. Based upon this evidence, the prosecution charged Mr. Nunez with possession of a Schedule I Controlled Substance, contrary to C.R.S. 1973, § 12-22-309, as amended, and C.R.S. 1973,

§ 18-18-105 (2) (a), as amended. (Record, Vol. I, 1-3; Record, Vol. II, hearing of 9/9/82, hereinafter "Vol. II, A," 52-55).

STATEMENT OF THE CASE

Through counsel, Mr. Nunez filed a motion to suppress the heroin seized from him and a motion requesting that the court order the prosecution to disclose the name of a confidential informant upon whose statements the search warrant executed on November 7, 1981, was partially based. (Vol. I, 5-7). On September 9, 1982, the District Court held a hearing on those motions. The affidavit for the warrant was introduced at the hearing. (Vol. II, A, 10). It (p. 2) contained information provided by three separate confidential informants. Defense counsel stated that he only sought the disclosure of one informant, alleging that only that person's credibility was in issue. (Vol. II, A, 9-10).

The affiant, Denver Police Sergeant Don DeNovellis, had written that the informant in question had told Sgt. DeNovellis that the informant had seen Mr. Nunez with a "large amount of heroin" within twenty-four hours of November 7, 1981. The informant said that Mr. Nunez had stated that he had just returned from Mexico, where he had purchased five ounces of heroin. The informant watched Mr. Nunez dilute the heroin and then package it in balloons. Sgt. DeNovellis wrote that the informant recognized heroin because he/she had previously used it. Sgt. DeNovellis also noted that the informant had previously provided him with reliable information that had led to seizure of heroin.

Defense counsel conceded that the credibility of the affiant, Sgt. DeNovellis, was not at issue. Instead, he

questioned the informant's veracity. He argued that the informant's identity should be revealed so that he could subpoena the informant to testify at the suppression hearing. (Vol. II, A, 13).

Mr. Nunez testified in order to support his attorney's allegations. Mr. Nunez stated that on October 31, 1981, he had driven his motorhome from his house on Norwich Street to the mountains in order to hunt. He said that he was accompanied by his father, his son, his nephew and a friend. Mr. Nunez stated that he had returned from his trip in the early morning hours of November 6, 1981. While he spent all of that day at the Norwich Street address, he insisted that no one visited his home except for his immediate family and at least eight other relatives. He denied that he had travelled to Mexico between October 31 (p. 3) and November 6. (Vol. II, A, 26-29). On cross-examination, Mr. Nunez admitted that he was awaiting trial in Denver on a charge of intimidating a witness. (Vol. II, A, 33-34). The defense did not present the testimony of any of the people who allegedly went hunting with Mr. Nunez or of anyone who had been at his home on November 6, 1981.

The prosecution argued that the court should not order the police to disclose the informant's identity. First, the prosecutor mentioned that disclosure of the informant's identity could endanger that person's safety. (Vol. II, A, 23). Second, he pointed out that defense counsel was not questioning the affiant's credibility, but rather the credibility of the informant. Third, he observed that the prosecution would not use the informant as a wit-

ness at trial because the informant was not a witness to the incident upon which the charge was based. Fourth, he submitted that there was no disagreement between the informant's statements and Mr. Nunez's testimony. He concluded by stating that defense counsel had not established that discloseure of the informant's identity would be essential to the motion to suppress. (Vol. II, A, 56-59).

After hearing arguments of both counsel, the trial court found that disclosure of the informant's identity was necessary to resolve the motion to suppress and ordered the prosecution to reveal the informer's name. (Vol. II, A, 62-63). The prosecutor subsequently informed the court that he would not disclose the informant's identity because he was concerned for his/her safety. (Vol. II, hearing of 9/24/82, 3). On October 7, 1982, the trial court, in a written opinion, found that disclosure of the informant was essential to the resolution of the case. Because the prosecution refused to disclose the informant's identity, the trial court suppressed the evidence taken from the (p. 4) defendant in the search that occurred on November 7, 1981. (Vol. I, 8-10). The prosecution then filed this interlocutory appeal.

ISSUE PRESENTED

Since defense counsel stated that he was not questioning the affiant's credibility, did the trial court apply an improper legal standard when it ordered the prosecution to disclose the informant's identity and, when the prosecution refused to do so, when it suppressed the evidence in this case.

SUMMARY OF THE ARGUMENT

The government has a qualified privilege to withhold the identity of a confidential informant. A court may override that privilege and order the prosecution to disclose the informant's identity if that information will be relevant to a case or necessary for the just resolution of a case. An accused's request for disclosure usually arises in two situations. First, if an informant was a witness the event upon which a criminal charge is later based, a court may order disclosure of that person's identity because he may be the source of a potentially exculpatory evidence.

Second, a defendant may seek the identity of a confidential informant who provided the police with information that subsequently appeared in a search warrant. In this situation, if the accused establishes, by a preponderance of the evidence, that the *affiant* lied or recklessly disregarded the truth in relating what the informant said, then the court may strike the sections of the affidavit based upon the questionable statements and evaluate the remainder to see if it establishes probable cause. In order to make this determination, a court, after a proper allegation by the accused that brings the *affiant's* (p. 5) credibility into issue, may order disclosure of the informant's identity so that he can be subpoenaed to testify.

There must be an attack upon the *affiant's* credibility before the informant can be disclosed. This requirement is based upon the purposes behind suppression hearings. Unlike the situation where an informant has witnessed a crime and may, therefore, know of relevant evidence, when an accused seeks to suppress evi-

dence he seeks to suppress the truth. The purpose of a suppression motion is to remove probative evidence from a jury's deliberation as a sanction for police misconduct. If the police act properly, then suppression of the evidence is inappropriate. If an *informant* lies or recklessly disregards the truth, but the police then act carefully and responsibly, suppression is an improper remedy because it will not discourage police misfeasance. In this scenario, the wrong doing, if any, comes from a private source: the informant. The Fourth Amendment's protections do not apply to such private sources.

In the case at bar, defense counsel readily conceded that the affiant's credibility was not an issue. That concession mooted his motions, because it established that there was no basis for ordering the prosecution to disclose the informant's identity or for suppressing the prosecution's evidence. Since there was no police misconduct in developing the search warrant, therefore, there was no reason for the trial court to impose any sanctions.

ARGUMENT

THE TRIAL COURT APPLIED THE WRONG STANDARD WHEN IT ORDERED THE PROSECUTION TO DISCLOSE THE INFORMANT'S IDENTITY AND THEN SUPPRESSED THE EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT.

It is a fundamental principle that the government is privileged to withhold the identity of informers who aid the police. *Rovario v. United* (p. 6) *States,* 353 U.S. 53 (1957); *McCray v. Illinois,* 386 U.S. 300 (1967). The reason for this qualified privilege is obvious. A person may

fear retribution from an accused and refuse to give the police important information about a crime unless that person's anonymity is assured. Some crimes would never be solved without the promise of confidentiality to some informants because the privilege encourages some citizens to provide the police with information that they would otherwise withhold.

If a defendant can demonstrate that the disclosure of an informant's name is "relevant and helpful to the defense of an accused, or . . . essential to the determination of a cause," then a trial court may invade the privilege and order the government to reveal an informant's identity. *Roviaro* at 60-61. There are few hard and fast rules that govern when an informant's identity should be revealed. Each case is decided *ad hoc* by balancing the public interest in the informant's anonymity against an accused's due process right to a fair trial. *Roviaro, supra; DeLaCruz v. People,* 177 Colo. 46, 492 P. 2d 627 (1972).

If a confidential informant is a witness to the event that forms the basis for a criminal charge, then the defendant's need for that person as a witness who may provide potentially exculpatory evidence is a strong factor for a trial court to consider when balancing the needs of the government and of the defense. *People v. Musgrave* 187 Colo. 135, 529 P. 2d 313 (1974). However, even in that situation a court is not required to order disclosure. *People v. Marquez,* 190 Colo. 255, 546 P. 2d 482, 485 (1976). In fact, if the evidence shows that a person was "an informant and nothing more," then the prosecution should not normally be required to disclose the informant's identity. *People v. Langford,* 191 Colo. 87, 550 P. 2d 329, 331 (1976).

Usually, an accused's request for disclosure of an informant's identity (p. 7) arises in two situations. *People v. Bueno,* 646 P. 2d 931 (Colo. 1982). First, as stated above, an informant may have witnessed a crime with which a defendant is charged and the disclosure of his name may be necessary to provide the defendant with a fair trial. Second, an accused may attack a search warrant based, in whole or in part, upon a confidential informant's statements. If the accused successfully makes certain preliminary showings, as will be discussed below, then the court may order disclosure of an informant's name so that he may be supboenaed [sic] to testify at the suppression hearing. *People v. Dailey,* 639 P. 2d 1068 (Colo. 1982).

The case at bar is focused upon the preliminary showing that a defendant must make before a court may order the government to reveal an informer's name. In *Dailey,* this Court held that if an accused can show, in good faith, that there is a statement in the affidavit that may be false, and that this misstatement may have been a product of the affiant's lies or his reckless disregard for the truth, then the court may order disclosure of the informant's identity. Then, if the [defendant] shows, by a preponderence of the evidence, that the affiant, in fact, committed perjury or recklessly ignored the truth, then the court may strike those statements from the affidavit and assess it on the remaining facts.

The defendant's preliminary burden was more fully defined in *People v. Bueno, supra.* In that case, Justice Quinn wrote at 936:

> **[A] defendant will meet this initial burden when he establishes a reasonable basis in fact to believe**

> that *the informer did not exist,* or, if he does, *he did not relate to the police* the information upon which the police purportedly relied as probable cause for the arrest warrant. (Emphasis supplied).

This statement makes it clear that an accused must question the conduct of the police in constructing the warrant before he may request the court to order the (p. 8) prosecution to reveal the informant's identity. This position is supported by at least two other Colorado decisions that are cited in *Dailey.*

In *People v. Woods,* 175 Colo. 34, 485 P. 2d 491 (1971), this Court distinguished between situations where the affiant's veracity was attacked and those where only the informant's credibility was questioned. Justice Erickson wrote at 492:

> [I]f the material in the affidavit is stated to be or appears to be hearsay information obtained from an informant or other person, and the information turns out to be incorrect, *we will not use hindsight as a test to determine whether the search warrant should or should not have been issued.* (Emphasis supplied).

In *People v. Arnold,* 186 Colo. 372, 527 P. 2d 806 (1974), the accused argued that the trial court, after hearing testimony that diametrically contradicted the information in the warrant provided by the informant, should have ordered disclosure of the informer's identity because he was "fictitious." This Court disagreed and affirmed the accused's conviction. Obviously, the accused had attacked the police-affiant's credibility by alleging that the informant did not exist.

The need for a demonstration of some police misconduct before an informant's identity should be ordered

disclosed is based on several grounds. First, without such a requirement, an accused would demand disclosure of an informer's name in every case. This problem was recognized in *McCray v. Illinois, supra.* The United States Supreme Court held that a court need not order disclosure unless an accused has established an evidentiary basis to believe that the police-affiant perjured himself or recklessly disregarded the truth. In quoting New Jersey's Chief Justice Weintraub at 306-307, the Supreme Court recognized that a defendant's "good faith" in challenging an informant's credibility could never be accurately tested. Thus, disclosure would become (p. 9) automatic. The Supreme Court rejected such a result.

Second, the purpose of a motion to suppress is to determine whether the state's representatives have gathered evidence in a way that offends the Constitution. The "exclusionary rule" is designed to control unjustified intrusions into the privacy of citizens by government agents. *Mapp v. Ohio,* 367 U.S. 643 (1961). However, that sanction is not aimed at the actions of private citizens, even if those acts are illegal. For example, if a private person conducts a search that would be unconstitutional if perpetrated by a police officer, a court will not "suppress" that evidence because it was not a product of government action. *Burdeau v. McDowell,* 256 U.S. 465, 475-476 (1921); *Coolidge v. New Hampshire,* 402 U.S. 443, 487 (1971); *People v. Benson,* 176 Colo. 421, 490 P. 2d 1287 (1971); *People v. Henderson,* 38 Colo. App. 308, 559 P. 2d 1108 (1976).

The United States Supreme Court applied this reasoning in *McCray v. Illinois, supra,* at 307-308:

> [T]he magistrate is concerned, *not with whether the informant lied*, but whether the *affiant* is truthful in his recitation of what he was told. If the magistrate *doubts the credibility of the affiant*, he may require that the informant be identified or even produced. (Emphasis supplied).

As the passage quoted above indicates, this Court seems to have adopted this position in *People v. Woods, supra.*

McCray and *Woods* both show that a court will not delete portions of a search warrant if the police acted properly in obtaining information from an informant, but it is then later determined that the informant was either lying or incorrect. Not only would such a sanction not serve any deterrent purpose, but this situation should not even trigger the Fourth Amendment's proscriptions because there has not been state action adverse to the accused. If a warrant (p. 10) should not be excised because the affiant's credibility is not in dispute, then, *a fortiori,* there is no reason to order disclosure of an informant's identity.

In the case at bar, the trial court applied the wrong standard when it ordered the prosecution to disclose the informant and, subsequently, when it suppressed the evidence taken from Mr. Nunez. When the trial court found that defense counsel had made the necessary showing to require the prosecution to reveal the informer's name (Vol. I, 9), it did so without requiring the defense to provide some reasonable facts that would show that the affiant lied or recklessly disregarded the truth. In fact, defense counsel clearly stated that he was not questioning the affiant's credibility. (Vol. II, A, 13). At that point, as the above cases indicate, the defense had failed to

establish the necessary factual predicate that would support the court's disclosure order. Without that predicate, the trial court had no basis to require the prosecution to reveal the informer's name, and, then, to suppress the evidense taken from Mr. Nunez. As this Court held in *People v. Bueno, supra,* at 936:

> In every case . . . an order of disclosure must be supported by the record and may not rest upon speculation or conjecture.

In the instant case, the record contains no indication that the disclosure order was supported by the record because defense counsel's statement removed any factual or legal basis for a disclosure order. The trial court's order suppressing the evidence and ordering the prosecution to reveal the informant's identity should therefore be reversed.

CONCLUSION

When defense counsel stated that the affiant's credibility was not questioned, United States Supreme Court and Colorado Supreme Court authority (p. 11) indicate that the defense abandoned any basis to request that the trial court order the prosecution to disclose the informant's identity. Without this necessary allegation of governmental misconduct, the issue of the informant's veracity is outside of the Fourth Amendment and the suppression of evidence or a disclosure order would not serve any prophylactic purpose. The trial court therefore erred when it found that the defense had made a necessary showing to require the prosecution to reveal the informer's name. Instead, the trial court should

have summarily denied both motions. The trial court's ruling should therefore be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 29th day of November, 1982, a true copy of the Opening Brief was deposited in the U.S. Mail at Adams County, Colorado, postage prepaid, in a securely sealed envelope, addressed to: Kenneth H. Stern, Esq., 1760 Lafayette Street, Denver, CO 80218.

/s/ Karyl Tudehope

SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

ANSWER BRIEF

(Filed December 16, 1982)

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant.

vs.

ANTONIO GUADALUPE NUNEZ,

Defendant-Appellee.

Interlocutory Appeal to the District Court,
Adams County, Colorado

Case No. 82CR0025

The Honorable Philip F. Roan, Judge

Respectfully submitted,

KARP, GOLDSTEIN & STERN

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(p. 1) SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

ANSWER BRIEF

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee.

I. STATEMENT OF FACTS

On November 7, 1981, members of the Denver Police Department obtained a search warrant to search premises and motor vehicles located at 8690 Norwich Street, Adams County, Colorado. The search warrant was based upon information from three (3) confidential informants. The search warrant was executed on November 7, 1981, and during the execution of same, fifteen (15) balloons were allegedly found in the pocket of the defendant Mr. Nunez. Inside the balloons, a substance was allegedly discovered which was later analyzed and found to be heroin. Based upon the evidence recovered from the

search of Mr. Nunez' pockets, the defendant was (p. 2) charged in a one count information with possession of a controlled substance, Schedule I in violation of C.R.S. 1973, § 12-22-3309, and § 18-18-105 (2) (a), as amended.

II. STATEMENT OF THE CASE

The defendant was arraigned in front of Judge Roan, Chief Judge of Adams District Court on February 2, 1982 (Vol. I, p. 15).

On February 25, 1982, the defendant filed the following motions: Motion to Suppress, Motion to Disclose Informant, Motion for Disclosure of Deals and/or Compensation (Vol I, pp. 4-7). On September 9, 1982, a hearing was held on the defendant's motions.

It must be noted that the only motion every adjudicated *on the merits,* was the Motion to Disclose Informant (Vol. II, 9-9-82 hearing, hereinafter referred to as "Vol. II, A," pp. 59-61). At the beginning of the September 9, 1982, hearing, counsel for the defendant had requested adjudication of the disclosure motion first so, in the event that it was granted, he could subpoena the confidential informant for the hearing on the Motion to Suppress (Vol. II, A, p. 13).

(p. 3) The court never reached the defendant's Motion to Suppress on the merits. Rather, it was granted on October 12, 1982, after the District Attorney had informed the court that he would not disclose the identity of the confidential informant despite being ordered to do by Judge Roan (Vol. I, 10).

On October 7, 1982, Judge Roan entered written Findings of Fact, Conclusions of Law, and Order re-

garding the defendant's Motion for Disclosure of Informant in which he granted same. On October 18, 1982, the appellant filed their Notice of Interlocatory Appeal pursuant to C.A.R. 4.1.

III. ISSUE PRESENTED

A. Is the ruling of a district court granting a Motion to Disclose Informant the proper subject of an interlocatory appeal pursuant to C.A.R. 4.1? If the court rules it has jurisdiction, did the trial court commit error in granting the Motion to Disclose Informant.

IV. SUMMARY OF ARGUMENT

A. As indicated above, the only motion ever adjudicated by the court was the defendant's Motion for Disclosure of Informant. After hearing testimony and the (p. 4) arguments of counsel, the court granted the defendant's motion based on his finding that the confidential informant would be a necessary witness at the suppression hearing (Vol. II, A, 63). Subsequent to this ruling, the district attorney indicated that he would not disclose the informant's identity and on the basis of this assertion, the court granted the defendant's Motion to Suppress.

In their opening brief, the appellant argues the merits of the court's ruling on the Motion to Disclose Informant. There is virtually no discussion regarding the granting of the Motion to Suppress since it is clear from the facts that it was imposed merely as a remedy for non-disclosure.

Therefore, before adjudicating the appellant's challenge to the trial court's ruling on disclosure, this Court

must first determine that it has jurisdiction to hear the instant appeal.

C.A.R. 4.1 sets specific limitations regarding which issues may be raised in an interlocutory appeal. The appellee would argue that a ruling on a Motion to Disclose Informant is not the proper subject for such an appeal.

Should the court determine that it has jurisdiction to hear the instant appeal it is clear that the trial court's ruling on the defendant's Motion to Disclose Informant was (p. 5) correct, both in law and fact.

In arguing that the trial court committed error in granting the Motion to Disclose Informant, the appellant misconstrues and misapplies the relevant sections of *People v. Dailey,* 639 P. 2d 1068 (1982). The *Dailey* case involved two issues: to wit, the granting of the defendant's Motion to Disclose Informant and the subsequent granting, *on the merits* of the defendant's Motion to Suppress Evidence.

The appellee cites, in support of its contention that the court erroneously granted disclosure, portions of the *Dailey case* dealing specifically with the issue of suppression. This court's discussion of the issue of disclosure, which is found in III of the *Dailey* decision, which was later affirmed and expanded in the case of *People v. Bueno,* 646 P. 2d 931 (1982), clearly supports the decision of the trial court in the instant case.

V. ARGUMENT

A. The ruling of a District Court granting a Motion to Disclose Informant is not the proper subject of

an interlocutory appeal pursuant to C.A.R. 4.1. Assuming *arguendo* that this Court has jurisdiction, the Trial Court did not commit error in granting the motion.

(p. 6) Rule 4.1 of the Colorado Appellate Rules specifically and strictly limits the type of rulings from which an interlocutory appeal may be taken. C.A.R. 4.1 reads in pertinent part:

> The State may file an interlocutory appeal in the Supreme Court from a ruling of a district court granting a motion made in advance of trial by the defendant for return of property and to suppress evidence or granting a motion to suppress an extra-judicial confession or admission; . . .

A plain reading of the rule would indicate that the State may not take an interlocutory appeal from a Motion to Disclose Informant. Furthermore, this court has held that the Supreme Court will not expand the jurisdiction set forth in the rule. *People v. Singleton*, 482 P. 2d 978 (1971).

A careful reading of the appellant's Notice of Interlocatory Appeal (Vol. I, 11) indicates that the only ground upon which the appeal is taken is the trial court's decision to suppress evidence based upon the prosecution's failure to disclose the identity of the informant (see paragraphs 4, 5, 6 and 7 of the appellant's Notice of Interlocutory Appeal, Volume I, 11). In other words, the appeal is taken only from the imposition of suppression as a remedy for non-disclosure. Therefore, suppression is really (p. 7) a collateral matter with disclosure being the real issue in controversy. C.A.R. 4.1 does not provide for an interlocutory appeal from a motion to disclose informant and therefore the instant appeal is outside the ambit of the rule.

The appellees are not unaware of footnote 8 of the *Dailey* decision. The fact that the trial court never determined the plaintiff's Motion to Suppress, on the merits, would make the instant situation distinguishable from the one discussed in the *Dailey* case. In that case this Court adjudicated both motions and therefore held that the issues were intertwined. The situation is quite different when suppression is imposed merely as a remedy for non-disclosure.

Should this court decide that it has jurisdiction to entertain the instant appeal, the appellee would argue that the decision of the trial court judge was correct both in law and fact.

It is axiomatic that courts throughout the nation have recognized a privilege on behalf of the prosecution to withhold from disclosure the identities of individuals who provide information to the police regarding possible law enforcement violations. *People v. Del Alamo,* 624 P. 2d 1301 (p. 8) (1981); *McKray v. Illinois,* 386 U.S. 300, 87 S.Ct. 1056, 18 L. Ed. 2d 62 (1967); *Roviaro v. United States,* 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).

This court and other courts, however, have recognized that "the privilege is not absolute, however, and must be confined in its application based upon its underlying purpose". *People v. Dailey, supra,* at p. 1076.

In the *Dailey* case, this court cited with approval the following tests prescribed by *Roviaro v. United States, supra:*

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls

> for balancing the public interest and protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informers testimony and other relevant factors. 353 U.S. at 62; 77 S.Ct. at 628-29; L. Ed. 2d at 646.

639 P. 2d at 1077.

(p. 9) In further elucidating this standard, this Court, in *Dailey* also cites the following passage from *Roviaro* with approval:

> Where the disclosure of an informant's identity or the contents of his communication is relevant and helpful to the defense of an accussed, or is essential to a fair determination of a cause, the privilege must give way. 353 U.S. at 60-61, 77 S. Ct. at 628, 1 L. Ed. at 645.

639 P. 2d at 1077.

Finally, this Court states that the decision regarding disclosure must be committed to the sound discretion of the trial court. *People v. Dailey, supra,* at 1077. Also this is consistent with numerous other decisions regarding the binding nature of a trial court's findings regarding the facts surrounding a particular case. See *People v. Ellis,* Colo. App. 539 P. 2d 135 (1975); *People v. Martinez,* 527 P. 2d 534 (1974); and, *People v. Trujillo,* 500 P. 2d 1126 (1972).

It should be noted, that the preceding authority is found in § III of the Court's Opinion in the *Dailey* case which contains the authority to be applied in determining the appropriateness of disclosure of an informant.

(p. 10) On page 7 of their opening brief, the appellants assert that, in order to obtain disclosure of the informant, the defendant, at the trial court level, must:

> Show, in good faith, that there is a statement in the affidavit that may be false and that the misstatement may have been a product of the affiant's lies or his reckless disregard for the truth, . . .

Appellant's Opening Brief, p. 7

While this standard is discussed in the context of the *Dailey* decision, it is found in Section II B of the Opinion which deals specifically with the standard to be employed in the actual adjudication of veracity challenges to search warrants. As the appellee has indicated above (perhaps ad nauseam), the trial court never reached, or ruled on, the defendant's veracity challenge to the search warrant in the instant case. Rather, the court ordered disclosure and when the prosecution failed to so disclose, ordered the evidence suppressed. Therefore, the appellants reliance on the above-cited standard set forth in the *Dailey* case is misplaced since it does not go to the issue of disclosure.

In *People v. Bueno, supra,* this Court further expanded upon the test or standard which governs disclosure of confidential informants. In the *Bueno* case, the discussion (p. 11) focused on the two common situations in which the disclosure of an informant is requested, to wit: for use in connection with a Motion to Suppress Evidence and for use at trial.

With respect to disclosure in connection with a Motion to Suppress, the court stated that "a defendant seeking disclosure must make an initial showing that

the informant will provide information essential to the merits of his suppression ruling. Id. at p. 935. The court goes on to state in *Bueno:*

> Thus, a defendant will meet this initial burden when he establishes a reasonable basis in fact to believe that an informer does not exist or, if he does, he did not relate to the police the information upon which the police purportedly relied as proper cause for an arrest or search. Disclosure in such cases not only safeguards the defendants right to be free from an unlawful arrest or search, but also protects the judicial process itself against abuse by false affidavit of testimony.

Id. at 936.

In the context of articulating this test or standard, this Court gives an example in which disclosure would be proper by alluding to the facts of the *Dailey* case which involved the defendant making an initial showing that good faith basis in fact existed to question the affidavit's accuracy. Id. at p. 936.

(p. 12) Once the informant is disclosed and the defendant has an opportunity to interview him and procure his attendance at the suppression hearing, then, in order to prevail on his Motion to Suppress, the defendant must prove that the misstatement or incorrect information in the affidavit is the product of the affiant's lies or reckless disregard for the truth. *People v. Dailey, supra,* at p. 1073-74.

To require the defendant to meet this burden without first disclosing the identity of the informant would effectively place him in an impossible situation. In fact, this predicament was recognized specifically by this Court in the *Dailey* case when it said:

> In order to have a fair opportunity to carry this burden, where, as here, the affiant claims reliance on an unnamed informant, the defendant needs an opportunity to inquire of the informant as to the information given by him to the officer and to develop background information bearing on whether the officer was reckless in relying on the informant as a source of information. Under these circumstances, if the defendant cannot learn the identity of the informant, he will be denied information essential to the merits of his suppression motion. .

People v. Dailey, supra, at 1076.

(p. 13) The facts of the instant case are nearly identical to those discussed in the *Dailey* case, and therefore, the rationale and holding of this Court in Part III of that decision should govern the instant appeal.

Judge Roan, in reaching his decision, was clearly cognizant of the correct law to apply to the facts of the instant case. In fact, on pages 16 and 17 of the transcript of the September 9, 1982, hearing, the court quotes extensively from some of the above cited passages of *Dailey* and *Bueno*. (See also Volume I, A, 59-62). It is also clear that his decision is supported by competent evidence.

At the September 9, 1982, hearing, the defendant took the witness stand and testified that he was out of town from October 31 through November 6, 1982 (Vol. I, A, 26-27). The defendant testified further that he had been driving his motor home on this trip (Vol. I, A, 27). This was in contradiction to the confidential informant's statement that during the two weeks preceding the preparation of the affidavit, Mr. Nunez had been seen delivering heroin in his motor home (see second to last full paragraph, page 2 of affidavit for search warrant).

The confidential informant had also testified that he had been present at the home of Mr. Nunez and observed him with a large amount of heroin in his possession which was (p. 14) contradicted by testimony which revealed that only immediate family members were present in the Nunez home at that time. (See third full paragraph of affidavit for search warrant as compared to Vol. II, A, 28-29).

Finally, the confidential informant stated Mr. Nunez had told him that he had just returned from Mexico where he had purchased heroin, which again, was in contradiction with Mr. Nunez' testimony that he had been out of town hunting with his family (see third full paragraph of affidavit for search warrant versus Vol. I (A), 26-27).

Based upon these and other facts adduced at the hearing, the trial court judge ruled that the defendant had made the required initial showing as required by *People v. Bueno,* and *People v. Dailey,* (Vol. II, A, 59-60). Clearly this decision was consistant with law and well within the sound discretion of the trial court judge.

Throughout its brief, the appellants place a great deal of reliance on trial counsel's statements. The appellee would argue that these statements are quoted out of context, do not stand for the proposition cited by the appellant, and have little or no bearing on the instant appeal.

(p. 15) On page 2 of their brief, the appellants state "defense counsel conceded that the credibility of the affidavit, Sgt. DeNovellis, was not at issue." (Opening Brief, 2). On page 5, the following statement appears:

> In the case at bar, defense counsel readily conceded that the affiant's credibility was not at issue.

Opening Brief, 5.

In support of this contention, the appellants refer this court to Volume II, A, 13 of the transcript. On the basis of these alleged statements, the appellants argue that the defendant's Motion for Disclosure of Informant is rendered moot.

In the first instance, the statement referred to by the appellants in their Opening Brief was made in the context of an offer of proof to take the place of the required affidavits for a veracity challenge to a search warrant under *Dailey* (Vol. II, A, 11-17). It is also clear that at the particular point in time the statement was made, defense counsel was cut-off by the court and not allowed to finish his train of thought (Vol. II, A, 13).

After defense counsel was cut-off, the district attorney made a similar argument to the one advanced herein regarding the effect of defense counsel's statement about the credibility of Sgt. DeNovellis (Vol. II, A, 13-15).

(p. 16) Immediately after the district attorney raised that issue, defense counsel clarified his earlier statement indicating that, at that particular point in time, the defendant could only carry his burden on the issue of recklessness but needed disclosure of the informant in order to prove intentional misstatement by the affiant or further support the claim of reckless disregard of the truth (Vol. II, A, 15-16).

This point was further clarified by his statements on pages 20 and 21 of the September 9, 1982, transcript

wherein it was pointed out that he was prepared to present evidence that "would carry the burden that there is a good faith reason to believe what this person said could not have possibly happened and, therefore, I think that it would incumbent upon the court to order disclosure so we could have this alleged informant in court to say, well, I did say this or I didn't say this or I said this and it was changed to this to find out exactly what did happen. Otherwise, how would a defendant . . ." (Vol. II, A, 20-21). These are the exact concerns expressed by this court in the *Dailey* case (cited on page 12 of the instant brief) which lead to the decision that the informant must be disclosed. *People v. Dailey, supra,* at p. 1076.

Finally, defense counsel consistantly impressed upon (p. 17) the court the need to have the confidential informant present at the suppression hearing, should disclosure be ordered, in order to carry the defendant's burden on the veracity challenge contained in the Motion to Suppress (Vol. I, A, 22-24).

VI. CONCLUSION

Based upon the facts and arguments contained above, even if this Court decides that it has jurisdiction of the instant appeal, it is clear that the trial court judge articulated and applied the correct legal standard in reaching his decision on the defendant's Motion to Disclose Informant. Furthermore, it is equally clear that based upon the facts adduced at the September 9, 1982, hearing, the court was well within its discretion in ordering disclosure.

Respectfully submitted,

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(p. 18) CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of defendant-appellee's Answer Brief by placing same in the United States mail, postage pre-paid and properly addressed this 16th day of December, 1982, to Steven L. Bernard, Chief Trial Deputy, 450 South Fourth Avenue, Brighton, Colorado 80601.

/s/ Nancy Thienes
Nancy Thienes

SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

REPLY BRIEF
(Filed December 29, 1982)

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee.

PAUL Q. BEACOM
District Attorney

STEVEN L. BERNARD
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(p. 1) SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

REPLY BRIEF

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,

Defendant-Appellee.

ARGUMENT I

THE COURT CAN REVIEW, IN AN INTERLOCUTORY APPEAL, THE TRIAL COURT'S DECISION TO ORDER THE PROSECUTION TO DISCLOSE THE INFORMANT'S IDENTITY.

Normally, an accused's request for disclosure arises in two different situations which may produce two different sanctions. First, a person charged with an offense may argue that an informer was a witness to the event that formed the basis of the charge. If the court finds that the informer's identity should be disclosed, and if the prosecution refuses to reveal that person's name, then the court may dismiss the charge. *People v. Bueno,* 646 P. 2d 931 (Colo. 1982); *People v. Musgrave,* 187 Colo. 135, 529 P. 2d 313 (1974).

Second, an accused may ask a court to order the prosecution to reveal an informer's identity so that the informer can be questioned about the information, incorporated in a search warrant's affidavit, that he gave to the affiant. If the accused satisfies certain necessary factual predicates, then the court may order the prosecution to disclose the informer's name. If the prosecution

refuses to comply with the court's order, then the court may delete from the affidavit the statements attributed to the informant. Then, if the affidavit no longer contains probable cause to believe that the accused committed a crime (p. 2) or that the evidence will be found in the place to be searched, the court may suppress the items seized pursuant to the warrant. *People v. Dailey,* 639 P. 2d 1068 (Colo. 1982).

In *People v. Dailey, supra,* the accused requested that a District Court suppress evidence seized from his home pursuant to a search warrant. Noting that the affidavit contained statements attributed to a confidential informant, the accused also asked that the court order the prosecution to reveal the informer's name so that the defense could question him. The District Court granted both of these motions. In reversing the District Court's decision to suppress the evidence, this Court discussed the limits of Interlocutory Appeals taken by the prosecution pursuant to C.A.R. 4.1.

When he examined C.A.R. 4.1, Justice Lohr wrote at 1076 that this Court may review orders which, by themselves, might be outside of the Rules' requirements, but, when coupled with another reviewable order, become a proper subject for consideration in an Interlocutory Appeal. This principle was then applied in *Dailey.* The District Court's decision to suppress the evidence clearly could be reviewed in an interlocutory proceeding. Because the order requiring disclosure of the informant's name was "intimately related" to the suppression order, Justice Lohr wrote that this Court could also review that decision in the Interlocutory Appeal.

In this case, the defendant filed a motion to suppress the evidence seized from his residence, alleging that the search warrant that authorized the seizure was not supported by probable cause. (Vol. I, 6-7). Defense counsel stated that he wished to know who the informant was so that counsel could supboena [sic] him/her to testify at the suppression hearing. (Vol. II, A, 22-24). In its written order, the trial court referred to the search warrant and (p. 3) summarized the statements attributed to the confidential informant. That court also noted that the defendant's request for a disclosure order was designed, in part, to challenge the search warrant. (Vol. I, 8-9). After the prosecution stated that it would not disclose the informer's name, the trial court suppressed the evidence "which is the subject of the Defendant's Motion to Suppress . . ." (Vol. I, 10). In fact, the trial court ruled at one point that the informant's identity should be disclosed only for purposes of the suppression hearing, not for use at trial. (Vol. II, A, 63).

This case is factually similar to *Dailey*. Here, the defendant sought to have evidence seized from his home suppressed. Unlike the accused in *People v. Musgrave, supra,* the defendant did not present any evidence that the informant was a witness to the acts upon which the charge was based. Therefore, the defense did not establish any grounds upon which the trial court could rest a decision to dismiss this case. The sanction that the trial court imposed was the sanction that the defendant requested: suppression of the evidence seized from him while he was in his home. This decision could only have been based on the trial court's finding that, without the information obtained from the informant, the affidavit

no longer established probable cause. As *Dailey* indicates, since the trial court's disclosure order was intricately intertwined with its suppression order, this Court may review both decisions pursuant to C.A.R. 4.1.

ARGUMENT II

BECAUSE THE DEFENDANT DID NOT PRESENT ANY EVIDENCE THAT THE AFFIANT LIED OR RECKLESSLY DISREGARDED THE TRUTH, THERE WAS NO BASIS FOR THE TRIAL COURT TO ORDER THE PROSECUTION TO DISCLOSE THE INFORMANT'S IDENTITY.

Both this Court and the United States Supreme Court have repeatedly (p. 4) recognized that confidential informers can provide the prosecution with invaluable information that can lead to just criminal convictions. In many cases, convictions would be impossible without information from such sources. Without the protection of confidentiality, many people would never tell the police what they know because they would fear that an accused would seek retribution.

Courts have balanced this need for anonymity against the accused's rights. A court may order the prosecution to reveal an informer's identity, but this order must be preceded by a factual demonstration by the accused that disclosure of the informant's name is necessary to a proper resolution of the case. *People v. Bueno, supra.* This requirement that the accused bears an initial burden before a court will order disclosure of an informant's name is designed to preserve an informer's anonymity unless and until the accused provides an adequate reason to dispense with that protection. Without this burden, an accused, prompted either by good or evil intentions, would always request that an informant's name be re-

vealed. Unable to read the accused's mind in order to divine his purpose, a court would almost always have to presume that the request was made in good faith and then order the prosecution to produce the informer's name. *McCray v. Illinois,* 386 U.S. 300 (1967). Because this chain of events would effectively destroy confidentiality, an accused must meet his initial burden so that a court may determine if the disclosure request is made for a reason involving the fairness of a criminal proceeding as opposed to one based upon the accused's appetite for vengeance.

When the defense asks a court to order the state to reveal the identity of an informer who provided information contained in a search warrant's affidavit, he must first make some factual showing that the *affiant* lied or recklessly disregarded the truth when he included the informant's statement in (p. 5) the affidavit. *McCray v. Illinois, supra,* at 307-308; *People v. Bueno, supra.* In quoting the United States Supreme Court, this Court explained that burden in *People v. Dailey, supra,* at 1074:

> [T]he defendant [must make] a *substantial* preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the *affiant* in the warrant affidavit . . . (Emphasis supplied).

Although the defendant attempts to avoid the consequences of his counsel's statements (Defendant's Brief, 14-16), it is clear that the focus of his argument was aimed at whether the informant had lied and not at the informant's veracity. Not only did defense counsel concede that he was not impugning Sergeant DeNovellis' credibility (Vol. II, A, 13), but he later admitted that he

was attacking "the veracity of the informant." (Vol. II, A, 21). In fact, the trial court adopted the position that the affiant's credibility was not at issue. (Vol. II, A, 18).

These statements lead to two conclusions. First, the record does not contain any testimony that indicates that the affiant lied or recklessly disregarded the truth. Therefore, there is no factual basis for the trial court's disclosure order. Second, because neither the trial court nor the defendant felt that the affiant's veracity was at issue, the defense could not, as a matter of law, meet its burden. *See, People v. Woods,* 175 Colo. 34, 485 P. 2d 491 (1971). Therefore, since the defendant could not make the necessary preliminary showing, there was no support in the record for the trial court's decision to order the prosecution to disclose the informant's identity.

Once an accused satisfies his initial burden, then a court's decision to order the government to produce the informer's name is normally within its sound discretion. However, when that decision is not based upon facts, then (p. 6) this Court will reverse that decision. *People v. Bueno, supra.* Here, not only is the record devoid of any evidence to suggest that the affiant acted improperly, but both the defendant and the court stated that they did not doubt the affiant's credibility. Therefore, as an issue of fact, the trial court's decision was unsupported by evidence. As a matter of law, once the trial court found that the affiant's credibility was no longer an issue, it could not proceed to order disclosure because the necessary legal predicate had not been established. Because the trial court based its suppression order on its erroneous

decision to order the prosecution to reveal the informant's identity, both those decisions should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 28th day of December, 1982, a true copy of the Reply Brief was deposited in the U.S. Mail at Adams County, Colorado, postage prepaid, in a securely sealed envelope, addressed to:

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/s/ Karyl Tudehope

IN THE SUPREME COURT OF COLORADO

No. 82SA512

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

v.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee.

Interlocutory Appeal from the District Court
of Adams County

Honorable Philip F. Roan, Judge

EN BANC ORDER AFFIRMED

February 22, 1983

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JUSTICE DUBOFSKY delivered the Opinion of the Court.

In this interlocutory appeal under C. A. R. 4.1, the People seek reversal of the Adams County district court's order suppressing evidence seized during a search of the defendant's house. The suppression order was entered following the district attorney's refusal to disclose the identity of one of the confidential informants upon whose statements the affidavit in support of the search warrent was based, in part. We affirm the suppression order.

On November 7, 1981, police sergeant Don DeNovellis executed an affidavit for a search warrant before a Denver district court judge, who issued a warrant authorizing a search of two motor vehicles and a house at 8690 Norwich Street in Denver. The affidavit stated in part:

> On 11-7-81 your affiant received information from a previously reliable confidential informant, that the said previously reliable confidential informant was

> at the location of 8690 Norwich St. in the past 24 hours of that date (11-7-81) and observed Antonio "Pic" Nunez with a large amount of heroin in his possession. This previously reliable confidential informant further related that Mr. Nunez was in the process of cutting (diluting) the heroin and was also putting the heroin in balloon packages. Mr. Nunez told the previously reliable confidential informant that he had just returned from Mexico and had purchased five ounces of heroin while he was there, bringing the heroin across the Mexico-United States border himself. This previously reliable confidential informant is knowledgeable in the packaging and appearance of heroin and has admitted to your affiant that said informant has used heroin in the past. This previously reliable C. I. has been reliable on at least two occasions within the past 18 months, giving your affiant information involving narcotic activity, and resulting in the recovery of quantity of heroin.

Upon receiving the warrant, narcotics officers searched the house at 8690 Norwich Street and seized 9.6 grams of heroin from the defendant. Nunez was arrested and charged with one count of possession of heroin, a Schedule I controlled substance, in violation of section 18-18-105, C.R.S. 1973 (1978 Repl. Vol. 8, 1982 Supp.).

The defendant filed motions to suppress and for disclosure of confidential informants. No supporting affidavit accompanied either motion. At the motions hearing, the district court granted the defendant's oral motion to amend the motion to suppress and to present an offer of proof in lieu of the supporting affidavits required by *People v. Dailey*, 639 P.2d 1068 (Colo. 1982). The district attorney stated that while he preferred that the affidavits be filed, he would consent to the presentation of the offer of proof in their stead. The court then

took testimony of Nunez' veracity challenge to the statements of the confidential informant. [1]

The defendant testified that he had been on a hunting trip from October 31 until November 6, 1981, and that no one but family members had been in his house on November 6, the date that the confidential informant was supposed to have seen him cutting heroin. The defendant also stated that he had not been to Mexico nor told anyone that he had been to Mexico during the week of October 31 to November 6. Sergeant DeNovellis testified that his informant alleged that he or she had been at Nunez' house on November 6, had seen Nunez with heroin then, and had been told by Nunez about his recent return from Mexico. Given the conflict in testimony, the district court ordered the district attorney to disclose the identity of the confidential informant or face suppression of the evidence seized during the search. When the district attorney refused to divulge the identity of the informant, the court granted the defendant's motion to suppress. [2]

/1 The defendant limited his challenge to that portion of the affidavit set out in text, *supra*. He specifically identified as untrue the allegations that a confidential informant had been at his house on November 6, 1981, and that he had told that person of his recent return from Mexico. The remainder of the affidavit contained the allegations of two other confidential informants, neither of whom specifically attested to having seen the defendant participate in any criminal activity.

/2 The defendant argues that because suppression was ordered as a sanction for nondisclosure and was merely collateral to the disclosure issue, this court lacks jurisdiction to hear the People's interlocutory appeal under C.A.R. 4.1. A ruling granting a defandant's pre-trial motion to suppress is

(Continued on next page)

The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of *People v. Dailey*. *Dailey* recognized that errors in an affidavit for a search warrant can result "from the informant's perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the informant." 639 P. 2d at 1075. When, following a veracity hearing, the probability of one of those kinds of error has been found, the election of remedies or sanctions is left to the discretion of the district court. The necessary foundation for the court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in fact to question the accuracy of the informant's recitals. *People v. Martinez,* — P. 2d — (Colo. 1983) (No. 82SA294, announced February 7, 1983) slip op. at 5; *People v. Bueno,* 646 P. 2d 931, 935-6 (Colo. 1982).

Our result in this case follows from *People v. Martinez, supra.*[3] Where the district court has determined

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subject to interlocutory appear under C.A.R. 4.1 The defendant's contention is controlled by our holding in *People v. Dailey, supra,* where we determined that an order granting the defendant's motion to disclose a confidential informant was "so intimately related" to the order suppressing evidence that it fell within the interlocutory appeal authorization of C.A.R. 4.1. 639 P. 2d at 1076, n. 8.

/[3] We note that here, as in *Martinez,* the defendant failed to comply with the prerequisites of *People v. Dailey* for motions and affidavits filed to seek suppression of evidence seized under a challenged search warrant. The People acquiesced in the waiver of those prerequisites at the hearing, however, and do not raise the point on appeal.

that the defendant has shown a good faith basis in fact to question the accuracy of an affidavit containing recitals based on information supplied by an unnamed informant and consequently has ordered that the informant be disclosed or be produced for an *in camera* hearing,[4] we will not disturb that ruling. When the People refused to disclose the identity of the informant, the district court properly suppressed the evidence seized during the search of the defendant's house.

The order of the district court is affirmed.

/4 The People did not request an *in camera* hearing at which the informant would be present for judicial interrogation in accordance with the guidelines in *Dailey, supra* at 1077, n. 11.